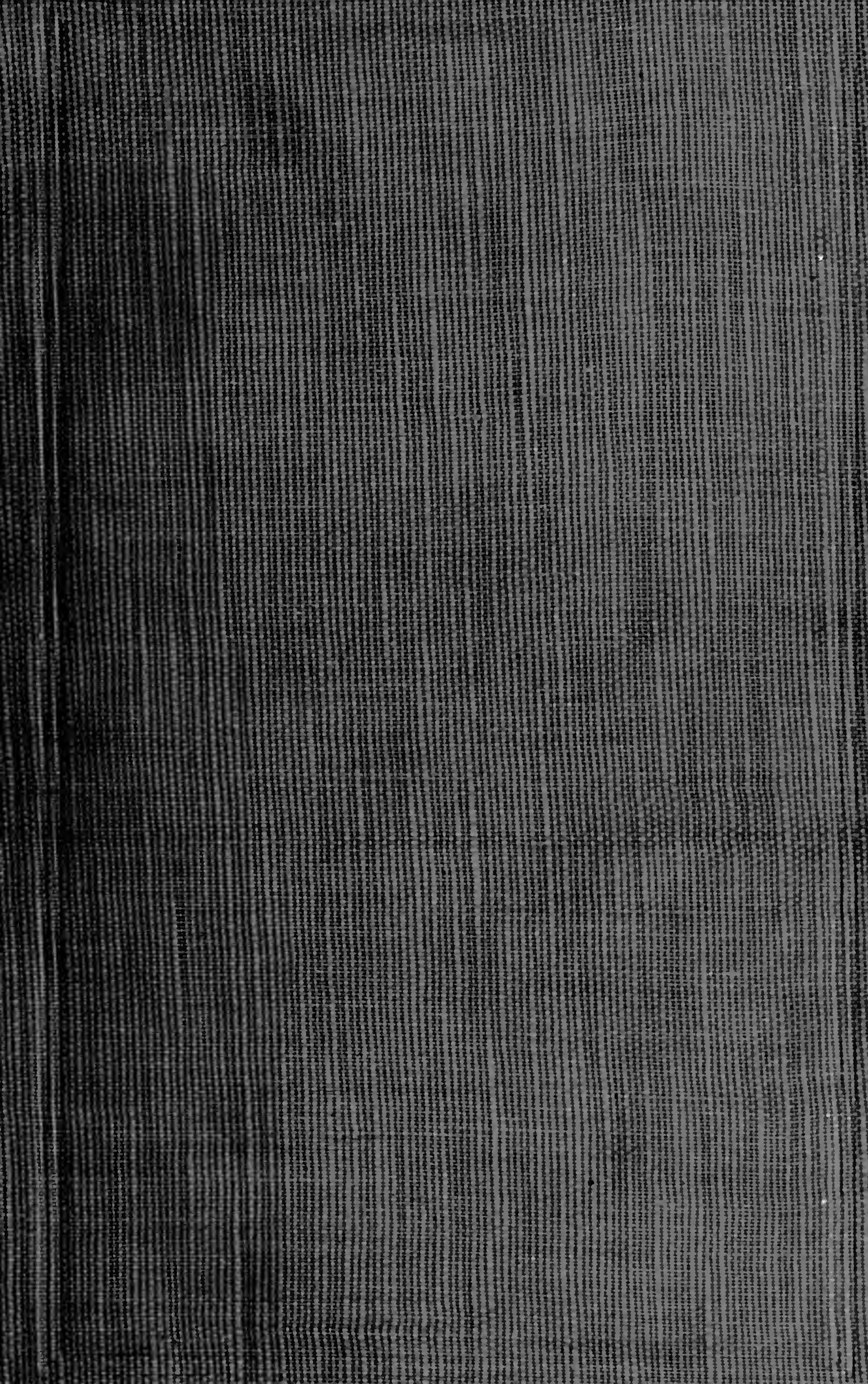

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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

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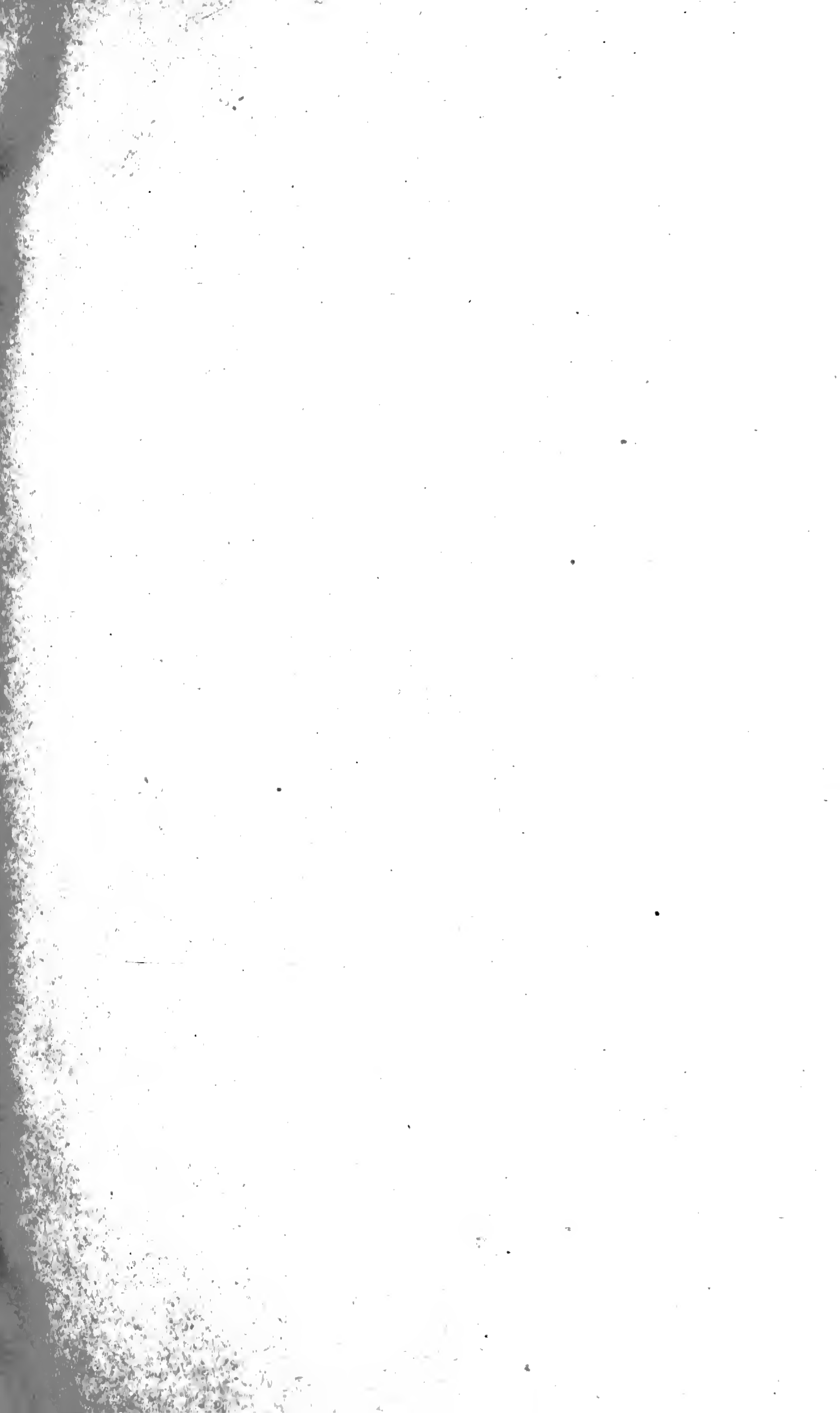

No. 2381

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, A Corporation,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

FILED
APR 18 1914

A. Carlisle & Co., 251 Bush St., S. F. Cal.

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876

878

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N. P. Headquarters Building, Tacoma, Washington;

Attorneys for Defendant in Error. [2*]

In the United States District Court for the Western District of Washington, Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Defendant.

No. 1399.
Stipulation for Transcript on Writ of Error.

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*Page-number appearing at foot of page of original certified typewritten Transcript of Record.

IT IS HEREBY STIPULATED AND AGREED that the following papers shall constitute the record on write of error in the above entitled cause, on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and that in preparing said transcript, the clerk shall, omit all captions, verifications, acceptances of service and other endorsements, excepting file marks, and that said transcript be printed, pursuant to the rules of the Circuit Court of Appeals:—

1.—This stipulation;
2.—Complaint;
3.—Answer;
4.—Record of trial;
5.—Verdict;
6.—Judgment;
7.—Order extending time for bill of exceptions;
8.—Bill of Exceptions and order settling;
9.—Assignments of error.
10.—Petition for Writ of error and allowance;
11.—Writ of Error;
12.—Citation.

CLAY ALLEN and MONROE C. LIST,
Attorneys for Plaintiff.

GEO. T. REID, J. W. QUICK and L. B. DA PONTE,
Attorneys for Defendant.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 29, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[3]**

Complaint.

Now comes the United States of America, by C. F. Riddell United States Attorney for the Western District of Washington, and brings this action on behalf of the United States against the Northern Pacific Railway Company, a corporation organized and doing business under the laws of the State of Wisconsin, and having an office and place of business at Tacoma, in the State of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, having required and permitted its certain conductor and employee, to-wit: Thos. Doyle, to be and remain on duty as such upon its line of railroad at and between the stations of Portland, in the State of Oregon, and Tacoma, in the State of Washington, within the jurisdiction of this Court, for sixteen hours in the aggregate during the twenty-four-

hour beginning at the hour of 1:10 o'clock, P. M., on May 12, 1913, to-wit: from said hour of 1:10 o'clock, P. M., on said date, to the hour of 12:30 o'clock, A. M., on May 13, 1913, and [4] from the hour of 6:55 o'clock, A. M., on May 13, 1913, to the hour of 11:15 o'clock, A. M., on May 13, 1913, did then and there require and permit said employee to remain and continue on duty as aforesaid until the hour of 1:00 o'clock, P. M., on May 13, 1913, and when said employee had not had at least eight consecutive hours off duty, as required by said Act.

Plaintiff further alleges that said employee, while required and permitted to remain and continue on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A SECOND CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees

thereon,'' approved March 4, 1907, (contained in 34 Statutes at Large, page 1415), said defendant, having required and permitted its certain trainman and employee, to wit: B. L. Eddy, to be and remain on duty as such upon its line of railroad at and between the stations of Portland, in the State of Oregon, and Tacoma, in the State of Washington, within the jurisdiction of this court, for **[5]** sixteen hours in the aggregate during the twenty-four-hour period beginning at the hour of 1:10 o'clock, P. M., on May 12, 1913, to wit: from said hour of 1:10 o'clock P. M., on said date, to the hour of 12:30 o'clock, A. M., on May 13, 1913, and from the hour of 6:55 o'clock, A. M., on May 13, 1913, to the hour of 11:15 o'clock, A. M., on May 13, 1913, did then and there require and permit said employee to remain and continue on duty as aforesaid until the hour of 1:00 o'clock, P. M., on May 13, 1913, and when said employee had not had at least eight consecutive hours off duty, as required by said Act.

Plaintiff further alleges that said employee, while required and permitted to remain and continue on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A THIRD CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, having required and permitted its certain trainman and employee, to wit: W. D. Edgerton, to be and remain on [6] duty as such upon its line of railroad at and between the stations of Portland, in the State of Oregon, and Tacoma, in the State of Washington, within the jurisdiction of this court, for sixteen hours in the aggregate during the twenty-four-hour period beginning at the hour of 1:00 o'clock, P. M., on May 12, 1913, to wit: from said hour of 1:00 o'clock, P. M., on said date, to the hour of 12:30 o'clock, A. M., on May 13, 1913, and from the hour of 6:55 o'clock, A. M., on May 13, 1913, to the hour of 11:15 o'clock, A. M., on May 13, 1913, did then and there require and permit said employee to remain and continue on duty as aforesaid until the hour of 1:00 o'clock, P. M., on May 13, 1913, and when said employee had not had at least eight consecutive hours off duty, as required by said Act.

Plaintiff further alleges that said employee, while required and permitted to remain and continue on

duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant i*a* liable to plaintiff in the sum of five hundred dollars.

WHEREFORE, plaintiff prays judgment against defendant in the sum of one thousand five hundred dollars and its costs herein expended.

C. F. RIDDELL, United States Attorney.

E. B. BROCKWAY, Asst. United States Atty.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Aug. 16, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[7]**

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff alleges as follows:

I.

For answer to the first cause of action therein the defendant admits the allegations thereof save and except the allegation that said employee while required and permitted to remain and continue on duty as aforesaid was engaged in and connected with the movement of said defendant's train No. 308, and also the allegation that said defendant is liable to the plaintiff in the sum of $500.00, which said allegations are denied.

II.

Defendant for answer to plaintiff's second cause of action admits the allegations therein contained save and except the allegation that said employe while engaged and permitted to remain and continue on duty as aforesaid was engaged in and connected with the movement of said defendant's train No. 308, and also the allegation that said defendant is liable to plaintiff in the sum of $500.00, which allegations are denied.

III.

Defendant further answer to plaintiff's third cause of action admits the allegations therein contained save and except the allegation that said employe while engaged and permitted to remain and continue on duty as aforesaid was engaged in and connected with the movement of said defendant's train No. 308, and also the allegation that said defendant is liable to the plaintiff in the sum of $500.00, **[8]** which allegations are denied.

AFFIRMATIVE DEFENSE.

Defendant for an affirmative defense to plaintiff's three causes of action alleges that the employes therein named were the conductor and brakeman, who regularly ran defendant's passenger train No. 333 from Tacoma, Washington, to Portland, Oregon, which train was due to leave Tacoma at 1:40 p. m., and due to arrive at Portland at 6:45 p. m. of the same day, and that said train crew on their regular run were due to leave Portland, Oregon on passenger train No. 308, due to leave Portland

at 7:25 a. m. and arrive in Tacoma at 12:35 p. m. the same day.

Defendant alleges that the tracks of this defendant, from Tacoma, Washington, to Portland, Oregon, at the times herein mentioned, were also used by the Oregon-Washington Railroad & Navigation Company for the operation of its trains, and that on the afternoon of the 12th day of May, 1913, passenger train No. 362 of said Oregon-Washington Railroad & Navigation Company was derailed between the stations of South Tacoma and Lakeview, Washington, and by reason of said derailment, the railway tracks were torn up so that it became and was necessary to transfer train crews and *ap*ssengers at the point of said wreck.

That the crew of this defendant's train No. 333, mentioned in the complaint of the plaintiff, left Tacoma on defendant's regular scheduled run to Portland at 1:40 p. m., May 12, 1913, but when said train reached the point where the tracks had been torn up by reason of the wreck of train No. 362, said train No. 333 was detained and the **[9]** crew and passengers thereof transferred to defendant's train No. 314, and by reason of said wreck, said train crew did not reach Portland until 12:30 a. m. of May 13, 1913; that said crew left Portland on defendant's regular scheduled run on train No. 308 at 7:25 a. m., May 13, 1913, and by reason of the casualty and unavoidable accident caused by the wreck of said train No. 362, the train crew mentioned in the complaint of the plaintiff was on duty a total of seventeen hours and twenty-five minutes, as in said complaint alleged; that the same was

caused by the casualty and unavoidable accident growing out of said wreck.

WHEREFORE, defendant prays that defendant's plea of not guilty herein be sustained, and that it go hence without day.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for defendant.

(Verification)

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Nov. 4, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[10]**

Record of Trial.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, AT THE CITY OF TACOMA, BEFORE THE HONORABLE EDWARD E. CUSHMAN, U. S. DISTRICT JUDGE, PRESIDING, ON TUESDAY, THE SECOND DAY OF DECEMBER, 1913, AMONG OTHERS THE FOLLOWING PROCEEDINGS WERE HAD:—

This cause coming on regularly at this time for trial, the plaintiff being present by Messrs. Clay Allen and Monroe C. List, and the defendant appearing by J. W. Quick, Esquire, a jury being ordered, the following named persons were called, sworn, examined and empanelled as the jury in this case:

W. S. Wilder	Robert Pattison
J. B. Comfort	Tom Brewitt
Chas. L. Bozelle	J. P. Nicholson
George Addison	W. R. Patton
Thomas Manners	A. A. Hinz
James Crowley	Harry Bates

whereupon the trial regularly proceeded with the introduction of evidence, oral and documentary, on the part of the plaintiff and defendant, the following witnesses testifying for the Government:

John Franklin Alsop and Thomas Doyle; and the following witness for defendant:

John Franklin Alsop.

Whereupon, at the conclusion of the evidence, the Government moved for directed verdict on three causes of action; motion denied. On motion of defendant for a directed verdict on the three causes of action, the motion was granted, and the jury returned the following verdict, which was ordered filed as the verdict in this case:

"We, the jury empanelled in the above entitled case, find the defendant not guilty as alleged in the first, second **[11]** and third causes of action, of the complaint filed herein, being instructed so to do by the Court.

TOM BREWITT, Foreman."

[12]

Verdict.

We, the jury empanelled in the above entitled case, find the defendant not guilty as alleged in the First, Second, and Third causes of Action of

the complaint filed herein, being instructed so to do by the Court.

TOM BREWITT, Foreman.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Dec. 2, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[13]**

Judgment.

Now on this 2nd day of December, 1913, the above cause coming on for trial in the above entitled court before the Honorable Edward E. Cushman, presiding Judge thereof, the plaintiff appearing by Monroe List, special counsel for the plaintiff, and the defendant appearing by J. W. Quick, its attorney, and both parties having introduced their evidence and rested, the plaintiff moved the court to instruct the jury to return a verdict in favor of the plaintiff on each of the three counts contained in the complaint, which motion was by the Court denied.

The defendant thereupon moved the court to instruct the jury to return a verdict in favor of the defendant on each of the three counts contained in the complaint, which motion was by the court sustained, and the jury thereupon, under the instructions of the court, returned a verdict in favor of the defendant, finding the defendant not guilty on each and all of the counts contained in the complaint.

It is, therefore, considered ORDERED and ADJUDGED by the court that the plaintiff take noth-

ing by reason of said action and that the defendant go hence without day.

Dated at Tacoma, Washington, this 27th day of December, 1913.

EDWARD E. CUSHMAN, Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Dec. 30, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[14]**

Order.

Upon motion of the United States Attorney;

It appearing that a Stipulation has been entered into in the above entitled cause, granting the plaintiff thirty days from February 2, 1914, in which to file its Bill of Exceptions;

IT IS HEREBY ORDERED, that the plaintiff may have until March 4, 1914, in which to file its Bill of Exceptions.

Dated this 24th day of January, 1914.

EDWARD E. CUSHMAN, Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jan. 24, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[15]**

Transcript of Evidence.

BE IT REMEMBERED that heretofore and upon, to-wit, the 2nd day of December, A. D. 1913, this cause came on regularly for hearing before the HON. EDWARD E. CUSHMAN, Judge of the above entitled court, and a jury;

The Plaintiff being represented by its attorneys and counsel, CLAY ALLEN, Esq., and MONROE C. LIST, Esq.; and

The Defendant being represented by its attorneys and counsel, MESSRS. REID, QUICK & DA PONTE.

Whereupon the following proceedings were had and done, to-wit:

Mr. QUICK.—We desire, with consent of counsel for the government, to amend the Affirmative Defence in line 18 by changing the time that the train was due to arrive at Portland. We have alleged at 3:25. It should be 6:45.

The COURT.—You have stipulated regarding it?

Mr. QUICK.—Just orally in Court.

The COURT.—If you will explain the matter to the clerk so it may be noted on the Answer.

Whereupon a statement of the case was made to the jury on behalf of the Plaintiff by Mr. List.

And a statement of the case was made to the jury on behalf of the Defendant by Mr. Quick.

And the Plaintiff, to maintain the issues on its part, introduced the following evidence:

J. L. ALSIP, a witness produced on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION,

(By Mr. List) **[16]**

Q. What is your name?

A. J. S. Alsip.

Q. What is your business?

A. Chief dispatcher.

Q. For what road?

A. Northern Pacific, Great Northern and O. & W.

Q. Where do you live,

A. Tacoma.

Q. Is your place of business in Tacoma?

A. Yes, sir.

Q. How long have you lived in Tacoma and how long have you been engaged as dispatcher for the Northern Pacific Railway Company?

A. I have resided in Tacoma four years. I have been chief dispatcher for the Northern Pacific, O. & W. and Great Northern for two years and four months I think it is.

Q. State what your duties are as chief dispatcher.

A. Well, if there are any duties on a railroad that I do not have a hand in, I do not know what they are, but my principal duty is to look after the operation of trains in general.

Q. Does that include trains operating between Tacoma, Washington and Portland Oregon?

A. Yes, sir.

Q. And operating between those points in May 1912?

A. Yes, sir.

Q. How are the records of the movements of those trains kept?

A. On a train sheet.

Q. And by whom was that made?

A. By what is termed trick train dispatchers.
[17]

Q. Those men are under your jurisdiction?

A. Yes, sir.

Q. And you have control over them?

A. Yes, sir.

Q. I hand you what purports to be a train sheet of the Northern Pacific Railway Company and ask you to state whether or not that is an official record of the company that is made in the manner in which you have just testified?

A. Yes, sir.

Q. Does it show the movements of trains between Tacoma, Washington and Vancouver, Washington?

A. Yes, it does.

Q. Referring now to the record of train 303 on May 12th, 1913, does that show the movement of that train?

A. Yes, sir.

Q. What time did that train leave Tacoma?

A. The record shows it left Tacoma at 1:40 P. M.

Q. And what time did it arrive at Portland, Oregon?

A. 12:30 A. M. the following morning.

Q. Or May 13th, 1913?

A. Yes, sir.

Q. What kind of a train was that?

A. Passenger train.

Q. Was it a regularly scheduled train?

A. Yes, sir.

Q. How long had that train been on that run—that particular train had been running between Tacoma and Portland?

A. Well, as far as I know, this particular train, it had been known by this number for a great number of years. I would not say positively how many years. **[18]**

Q. Referring to the train sheet for May 13th, 1913, and more particularly to train No. 308, what time did that train leave Portland, Oregon?

A. The record shows it left Portland at 7:25 A. M.

Q. May 13th, 1913?

A. Yes, sir.

Q. What time did it arrive in Tacoma?

A. It arrived in Tacoma at 1:00 P. M. the same day.

Q. What was the first station *tha* train reached after crossing the state line and coming into the State of Washington?

A. Vancouver.

Q. What time was that?

A. 7:55, departing at 8:00 o'clock.

Q. Who was the conductor of that train?

A. Conductor Doyle.

Q. And his full name?

A. I am not familiar with it, but I know his name is Tommy Doyle, but his full name, I am—(interupted)

Q. Have you with you the time slip of Mr. Doyle for May 12th and 13th, 1913?

A. I have not.

Mr. LIST.—Those were asked for, Mr. Quick.

Mr. QUICK.—Who would have the time slips?

A. The superintendent's office, but so far as I know, no request was made for the time slips. In

fact, when I started, there had been no request given for the train sheets, but I brought them along, simply as a matter of record.

Mr. QUICK.—What do you want to show?

[19]

Mr. LIST.—I wanted to show the hours of service.

Mr. QUICK.—That train sheet will show the hours of service.

Q. (by Mr. List). Under the rules of your company, what time on May 12th, was Mr. Doyle required to report for duty?

A. Thirty minutes before leaving.

Q. Was that rule also in effect with respect to the train coming up from Portland to Tacoma?

A. Yes, sir.

Q. That is what is known as the preparatory time?

A. Yes, sir.

CROSS EXAMINATION,

(By Mr. Quick)

Q. Does your train sheet show any delay to train Number 303?

A. Yes, sir.

Q. What engine was pulling 303?

A. Leaving Tacoma?

Q. Yes.

A. 215

Q. What does it show as to delay?

A. It shows a delay of two hours and eleven minutes at South Tacoma and a delay of two hours and twenty-one minutes transferring with train

Number 314 at the point of accident, about a mile and a half of Lake View, or a total delay of four hours and twenty-five minutes, I think it would be.

Q. What was the cause of that delay?

A. That delay was on account of the O. W. R. & N. train Number 362 being derailed at a point about a mile and a half east of Lake View at about 1:50 P. M. **[20]**

The COURT.—North?

Mr. QUICK.—It is east and west on railroad parlance.

The WITNESS.—Geographically north.

Q. (By Mr. Quick). That is between Lake View and South Tacoma?

A. Yes, sir.

Q. Did that wreck of the O. & W. train tear up the track?

A. Yes, sir.

Q. How long was the track in a condition to prevent the passage of trains?

A. I would not be positive without looking it up, but it seems that it was about seven—let us see, maybe I can tell by this train sheet—I would say, without going into it very thoroughly, about 9:00 o'clock, and then passable along a track which had been built around the derailed cars and engine.

Q. It necessitated the building of a temporary track around this wreck?

A. Yes, sir.

Q. And then what was done with the crew and passengers of train 303 at that point? Did they go on through to Portland?

A. They were instructed to transfer with train

314 that arrived at the wreck, that is coming from Portland to Tacoma, and the crew that left Tacoma went over to the other side of the track and took charge of the train and equipment of Number 314 and proceed to Portland; the crew that arrived at the point of accident on Number 314 came over and took charge of the equipment of 303 which had left Tacoma, and return to Tacoma with it and the **[21]** passengers from Portland—in other words, the passengers and the crew transferred.

Q. What time did Mr. Doyle and the crew and the equipment of 314 to which they had transferred get to Portland?

A. 12:30 A. M.

Q. And was his regularly scheduled run, for his crew, then back on 308 the following morning?

A. It was.

Q. And that had been the regular run for that crew for how long, if you know?

A. Well, so far as I know, for a great number of years, at least since I have been here for four years.

Q. That is, they would go down on 303 and come back on 308?

A. Yes, with the possible exception that occasionally, for personal reasons, Mr. Doyle and the other crew would change. It was permissible on application to the superintendent, but generally speaking, that was his run for years and years.

Q. Now, what effect did this wreck of the O. & W. have on train service?

A. It simply demoralozed the service. We had a great number of passenger trains coming close to

the wreck that it was necessary to take care of one way or another, and who were working at the wreck—it was a single track and it was necessary to build a track around it, and necessary at the same time, to as soon as possible relieve the situation and transfer the passengers from the derailed train to Tacoma and make special provisions for their care and the injured persons,—there were, I believe, five persons killed and [22] generally speaking, we were just about as busy as we possibly could be.

Q. What roads operate over this single track line between here and past the wreck?

A. The Northern Pacific, O. & W. and the Great Northern.

Q. And about how many train in twenty-four hours pass there?

A. Well, we have between Tacoma and Portland in twenty-four hours, eleven passenger trains each way.

Q. That would be twenty-two passenger trains?

A. Yes, and in addition to that we have three passenger trains each way that run from Tacoma to Lake View and branch off at Lake View for the Grays Harbor territory, which is past the point of the wreck.

Q. That would make six more?

A. That would make six more trains—passenger trains.

Q. Were there a number of freights in addition to that?

A. Yes, local freight trains.

Q. And did the dispatchers office here have to make provision for all of those trains?

A. Yes, sir.

Q. And this provision had to be made by reason of this wreck?

A. Yes, sir.

Q. And it changed your entire schedule?

A. We had to take care of the emergencies that came along for all trains.

Q. And this delay of 303 was occasioned then by that wreck?

A. Yes, sir.

RE-DIRECT EXAMINATION,

(By Mr. List)

Q. What time was Number 303 stopped on account of the wreck? **[23]**

A. What time was 303 stopped or delayed on account of the wreck?

Q. Yes, when it first ran into the wreck.

A. Had the operation not been interfered with by the wreck, they would have met this train that was derailed at South Tacoma. They were waiting at South Tacoma for their arrival, Number 303 arrived at South Tacoma at 1:56 P. M. and the wreck occurred about 1:50. They would probably not have been delayed over two or three minutes at South Tacoma.

Q. What time did Number 303 start on its way to Portland after getting clear of the wreck?

A. What time did they finish transferring do you mean?

Q. Yes, starting to Portland?

A. After transferring the passengers they left Lake View at 6:28 P. M.

Q. After leaving Lake View, did they keep their schedule run or did they run behind time from that point to Portland?

A. After leaving Lake View they necessarily lost time for the reason that the train, engine and the equipment they had transferred to necessarily had to back up to a place near Centralia; therefore, they were not in a position to maintain schedule time.

Q. What was the schedule running time of that train from Lake View to Portland?

A. I have not the time card here.

Q. I hand you a time card and ask you to state the schedule running time of that train from Lake View to Portland.

A. (Examining paper) It would be 4:40 **[24]**

Q. So, before that train go to Portland, it was known to the official of the company, wasn't it, that they could not get their eight hours rest and return on the regular train?

A. It was known by the time they arrived in Portland, yes, that they would not get their eight hours rest at Portland.

Q. And was it also known that if they did return on their regular train that the sixteen hour period of aggregate service would have expired before they got in at Tacoma?

A. I am not sure just what time they consumed going down, but the returning time if they had maintained their schedule, would have been five hours and ten minutes, that added to your time

as shown there, would show whether or not it could have been made.

Q. The schedule running time is five hours and ten minutes. They would not have run ahead of the scheduled time?

A. No, sir.

Q. So, noting the time they had been on duty when they got in to Portland, adding that to the schedule time, the officials knew they could not get into Tacoma and be within the sixteen hours?

A. Yes, sir.

Q. Knowing that, was any effort made to send another crew out on 308 from Portland to Tacoma?

A. No, sir.

Q. Was any effort made to relieve that crew on 308 at a point where there was reason to believe that the sixteen hour period would be up?

A. No, sir.

RE-CROSS EXAMINATION,

(By Mr. Quick) [25]

Q. Why do you say it was known by the officials here that they would be out more than sixteen hours? Do you know whether it was checked up or whether they had time to check up or not?

A. I do not say that it was checked up. I say the figures show it. It could have been known or would have been known if it had been checked up.

Q. Do you know whether or not they had opportunity to check it up under the conditions?

A. As I understand it, the night chief, in handling the matter overlooked the fact that Mr. Doyle would not have time to return to Tacoma.

Q. He was not on duty at the time the train left Portland or during the night, but the night chief, as I understand it, explained—(interrupted)

Mr. LIST.—Never mind what he explained.

Q. (By Mr. Quick) Was the night chief tied up with his work during the night similar to what you had been doing in the day?

A. Yes, he must have been, because I was as busy as I could be, and I probably worked until 10:30 or 11:00 o'clock that night before I could go home. Ordinarily I left between 6:00 and 6:30, not later than 7:00.

Q. Was the additional work entailed by reason of this wreck?

A. *Ys,* sir.

(Witness excused) **[26]**

THOMAS DOYLE, a witness produced on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION,

(By Mr. List)

Q. What is your name?

A. Thomas Doyle.

Q. How are you employed?

A. As a conductor on the Northern Pacific.

Q. What kind of service, freight or passenger?

A. Passenger.

Q. How were you employed last May in passenger service, running between what points?

A. Between Tacoma and Portland.

Q. How long have you been employed as a passenger conductor by the Northern Pacific Railway Company?

A. Since 1891.

Q. And how long running between these points?

A. I have not exactly the dates, but it is somewhere in the neighborhood of fifteen or twenty years, perhaps.

Q. Were you the conductor on the train known as 303 running from Tacoma, Washington, to Portland, Oregon, on May 12th, 1913?

A. Yes, sir. Q. And were you also the conductor on the train running from Portland to Tacoma known as 308 the next day?

A. Yes, sir. Q. Who were your brakemen on that trip?

A. Yes, sir.

Q. Who were your brakemen?

A. Mr. Eddy and Mr. Edgerton.

Q. Were they with you on both trains? **[27]**

A. Yes, sir.

Q. How long had they been running with you on both trains?

A. Well, it has been,—Edgerton has been with me four or five years, the other man perhspa six or eight months.

Q. On those particular trains?

A. Yes, sir.

Q. What was the initial terminal of train 303?

A. Portland.

Q. And its other terminal?

A. Tacoma.

Q. What was the initial terminal of Number 308?

A. The same, from Portland to Tacoma.

Q. The initial terminal Portland and the final terminal Tacoma?

A. Yes, sir.

Q. What time did you report for duty on May 12th, 1913?

A. In the afternoon, perhaps somewheres after 1:00 o'clock.

Q. The train was scheduled to leave—

A. At 1:40.

Q. What time do you report for duty?

A. At 1:10. I do not know as I reported for duty at 1:10.

Q. You report sometime prior to the departure of the train?

A. Yes, sir.

Q. Did that rule apply to your brakemen, Eddy and Edgerton?

A. Yes, sir.

Q. Did they report with you at that time so far as you know?

A. Yes, so far as I know.

Q. Now, you were in continual service on your train from Tacoma to Portland at that time?

A. Yes, sir. **[28]**

Q. And also the two brakemen?

A. Yes, sir.

Q. What time did you report for duty at Portland on your return trip the next day on 308?

A. I would say about 7:00 o'clock. We were scheduled out of there at 7:35.

Q. Along about 6:58 or 7:00 o'clock?

A. Somewhere along there.

Q. Those were your regular runs?

A. Yes, sir.

Q. Did you ever receive a call to go out on these trains or did you simply report?

A. We simply reported, they have no call boy in Portland.

Q. I will ask you to state what is the practise of running a scheduled passenger train. Has it any right to exceed the scheduled running time?

A. No, sir.

Q. And so when you left Portland at a certain time, you knew you were going to be on duty at least the scheduled running time on that train?

A. Yes, sir.

Q. Were you relieved from duty on 308 at any place between Portland and Tacoma?

A. No, sir.

Q. Was either of your brakemen relieved from duty on that train?

A. No, sir.

CROSS EXAMINATION,

(By Mr. Quick)

Q. You say you have been a passenger conductor for over twenty years? **[29]**

A. Since 1891, yes, sir.

Q. And been on this run for fifteen or twenty years, I believe you said?

A. Yes, sir.

Q. And are you familiar with the hours of service law, the federal law?

A. Yes, sir.

Q. And what delayed you on this run on 303?

Mr. LIST.—We will admit that they delay was due to an unavoidable accident at South Tacoma.

Mr. QUICK.—All right.

Q. Have you any instructions, from your superiors as to what to do in regard to the sixteen hour law?

A. Yes, sir.

Q. And what are your instructions?

A. Well, they are put out in the way of a bulletin explaining the hours we shall work and when we shall be released.

Q. What does it require you to do, to warn you against exceeding—(interrupted)

A. Yes, we are warned against exceeding the sixteen hour law, that is, working over sixteen hours.

Q. And did you report to the dispatcher or any of your superior officers the length of time you would be out on this run?

A. No, sir.

Q. Or call for relief?

A. No, sir.

Q. Did it occur to you that you would be out?

A. I never thought a thing about it. It never occurred to me at all. **[30]**

Q. It did not come to your attention until after it happened?

A. No, sir, I did not think anything about it until my attention was called to it by the trainmaster or train dispatcher I think it was.

Q. That was after you got in on 308?

A. It seems to me it was the next day they spoke to me about it; I am not sure about that.

Q. Do you think it was when they were checking up the next they they found out?

A. I think they found it, yes, sir.

RE-DIRECT EXAMINATION,

(By Mr. List)

Q. They had a right at Portland to put another crew on that train and send it out in your place?

A. Yes, they had a right to if they—(interrupted)

Q. And you received no message notifying you to lay off and take your required rest?

A. No, sir.

Q. And they could have relieved you possibly at some point up the line?

A. I do not know hardly how they could get a crew out there.

Q. Did they have a right to do that?

A. I could not answer that. I do not think—there was no train out there in time to get a crew out to relieve us.

Q. I am asking you if they had a right. Was there any effort made to do it?

A. No, sir, there was no effort made to do it.

Q. Did they have a right to do it?

A. Yes, they had a right to do it. They have a right to relieve me anywheres.

(Witness excused)

PLAINTIFF RESTS. [31]

2:00 P. M.

And the Defendant to maintain the issues on its part introduced the following evidence:

J. F. ALSIP, a witness heretofore sworn on behalf of Plaintiff, now being recalled on behalf of Defendant, testified as follows:

DIRECT EXAMINATION,

(By Mr. Quick)

Q. I just wanted to ask Mr. Alsip another question. Mr. Alsip, was the circumstances relating to the handling of this particular train and train crew and the schedule time it was in service reported to the government right away?

A. Yes, sir.

Q. That is always done where there is an employee kept over the sixteen hours?

A. Yes, whether it is excusable or not, we make a report.

Q. Whether it is excusable or not, a report is made to the government?

A. Yes, sir.

(Witness excused)

DEFENDANT RESTS.

Mr. LIST.—I move the Court for a directed verdict for the government upon each count, being three counts altogether, the evidence having resolved itself into a question of law as to the construction of the hours of service act.

The COURT.—Motion for directed verdict on the part of the government denied.

Exception allowed. **[32]**

Mr. QUICK.—At this time, we will onenly, in open court, make a motion to instruct the jury to return a verdict in favor of the defendant.

The COURT.—The Court will instruct a verdict for the defendant on each of the counts.

Mr. LIST.—The government desires to except to the refusal of the court to peremptorily instruct the jury to return a verdict for the plaintiff on the first, second and third causes of action.

The government desires to except to the action of the court in directing a verdict for the defendant upon the first, second and third causes of action.

Exceptions allowed.

(Verdict signed and returned in open court).

[33]

STATE OF WASHINGTON, } ss.
County of Pierce. }

I, Edward E. Cushman, Judge of the United States District Court for the Western District of Washington, Southern Division, and the Judge before whom the foregoing case of United States of America, plaintiff, v. Northern Pacific Railway Company, defendant, was heard and tried, do hereby certify that the matters and proceedings embodied in the foregoing Transcript of Evidence are matters and proceedings occurring in the said cause, and that the same are hereby made a part of the record therein; and I further certify that the said Transcript of Evidence, together with all of the Exhibits and other written evidence on file in said cause, and attached to said Transcript of Evidence, contains all the material facts, matters and proceedings heretofore occurring in the said cause and not already a part of the record therein; that said

Transcript of Evidence, with the Exhibits attached thereto, are hereby made a part of the record in said cause, the Clerk of this Court being hereby instructed to attach all the Exhibits thereto.

Counsel for the respective parties being present and concurring herein, I have this day signed this statement of facts.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day of February, A. D. 1914.

EDWARD E. CUSHMAN, Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[34]**

Assignment of Errors.

The plaintiff in this action, in connection with its petition for a Writ of Error, makes the following assignment of errors, which it avers occurred upon the trial of the case, to wit:

1.

The Court erred in refusing to peremptorily instruct the jury to find for the plaintiff on the first, second and third causes of action of plaintiff's complaint, as was requested by counsel for plaintiff at the conclusion of the taking of testimony in the case.

2.

The Court erred in peremptorily instructing the jury to find for the defendant on the first, second and third causes of action of plaintiff's complaint, which request for such peremptory instruction was

made by counsel for defendant at the conclusion of the taking of testimony in the case.

3.

The Court erred in entering final judgment against the plaintiff and dismissal of this action.

CLAY ALLEN,
MONROE C. LIST,
Attorneys for Plaintiff.

[35]

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[36]**

Petition for Writ of Error.

The plaintiff above named, The United States of America, feeling itself aggrieved by the judgment of the Court, made and entered in this cause on the 30th day of December, 1913, herein, comes now by its attorneys, Clay Allen and Monroe C. List, and petitions this Court for an order allowing it to prosecute a Writ of Error to the Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided.

CLAY ALLEN,
MONROE C. LIST,
Attorneys for Plaintiff.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[37]**

Order Allowing Writ of Error.

Upon the motion of Clay Allen and Monroe C. List, Attorneys for the plaintiff, The United States of America, and upon the filing of petition for Writ of Error and an Assignment of Errors;

IT IS ORDERED, That a Writ of Error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein.

WITNESS THE SIGNATURE OF THE HONORABLE EDWARD E. CUSHMAN, Judge of the above entitled Court, at Tacoma, Washington, this 3 of February, 1914.

EDWARD E. CUSHMAN, Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[38]**

United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Ninth Judicial Circuit, } ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable Judge of the District Court of the United States for the Western District of Washington,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court, before you, or some of

you, between The United States of America, plaintiff, and the Northern Pacific Railway Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said The United States of America, plaintiff, as by this complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said circuit, within thirty days from date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice **[39]** of the United States, this 3rd day of February, 1914, A. D., and in the one hundred and thirty-eighth year of the Independence of the United States of America.

FRANK L. CROSBY,

(SEAL) Clerk of the District Court of the United States for the Western District of Washington.

By E. C. ELLINGTON, Deputy.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[40]**

Citation.

THE UNITED STATES OF AMERICA, Ninth Judicial Circuit, } ss.

To the Northern Pacific Railway Company, a corporation, and Messrs. Reid, Quick & Da Ponte, its attorneys,

GREETING:—

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in said circuit, on the 5th day of May, 1914, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the Western District of Washington, wherein the United States of America is plaintiff in error and the Northern Pacific Railway Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 3rd day of **[41]** February, 1914, and

in the one hundred and thirty-eighth year of the Independence of the United States of America.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[42]**

Certificate of Clerk.

UNITED STATES OF AMERICA, }
Western District of Washington. } ss.

I, FRANK L. CROSBY, Clerk of the United States District of Washington, do hereby certify that the foregoing and attached are a true and correct copy of the record and proceedings in the case of UNITED STATES OF AMERICA vs. NORTHERN PACIFIC RAILWAY COMPANY, a corporation, lately pending in this court, as required by the stipulation of counsel filed in said cause, as the original thereof appear on file in said court, at the City of Tacoma, in said District.

And I do further certify that I hereto attach and herewith transmit the original Writ of Error and Citation.

And I further certify that the cost of preparing and certifying the foregoing record is the sum of $24.70 which amount will be reported by me as an earning in the cost bill to the Government for the quarter ending March 31st, 1914.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the

City of Tacoma, in said District, this sixteenth day of February, A. D. 1914.

(SEAL) FRANK L. CROSBY, Clerk.
By E. C. ELLINGTON, Deputy Clerk.

[43]

United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, Ninth Judicial Circuit, } ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable Judge of the District Court of the United States for the Western District of Washington,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court, before you, or some of you, between The United States of America, plaintiff, and the Northern Pacific Railway Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said The United States of America, plaintiff, as by this complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at

San Francisco, in said circuit, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice **[44]** of the United States, this 3rd day of February, 1914, A. D., and in the one hundred and thirty-eighth year of the Independence of the United States of America.

FRANK L. CROSBY,
(SEAL) Clerk of the District Court of the United States for the Western District of Washington.
By E. C. ELLINGTON, Deputy.

[45]

No. 1399.

In the District Court of the United States for the Western District of Washington
Tacoma

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RY. CO.,
Defendant in Error.

Writ of Error.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division,

Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [46]

United States Circuit Court of Appeals for the Ninth Circuit Court.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

v. No. 1399

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA } ss.
Ninth Judicial Circuit.

To the Northern Pacific Railway Company, a corporation, and Messrs. Reid, Quick & DePonte, its attorneys,

GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in said circuit, on the 5th day of March, 1914, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the Western District of Washington, wherein the United States of America is plaintiff in error and the Northern Pacific Railway Company, a corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned,

should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 3rd day of **[47]** February, 1914, and in the one hundred and thirty-eighth year of the Independence of the United States of America.

EDWARD E. CUSHMAN,
United States District Judge.

[48]

No. 1399.

In the District Court of the United States for the Western District of Washington

UNITED STATES OF AMERICA,
Plaintiff,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Citation.

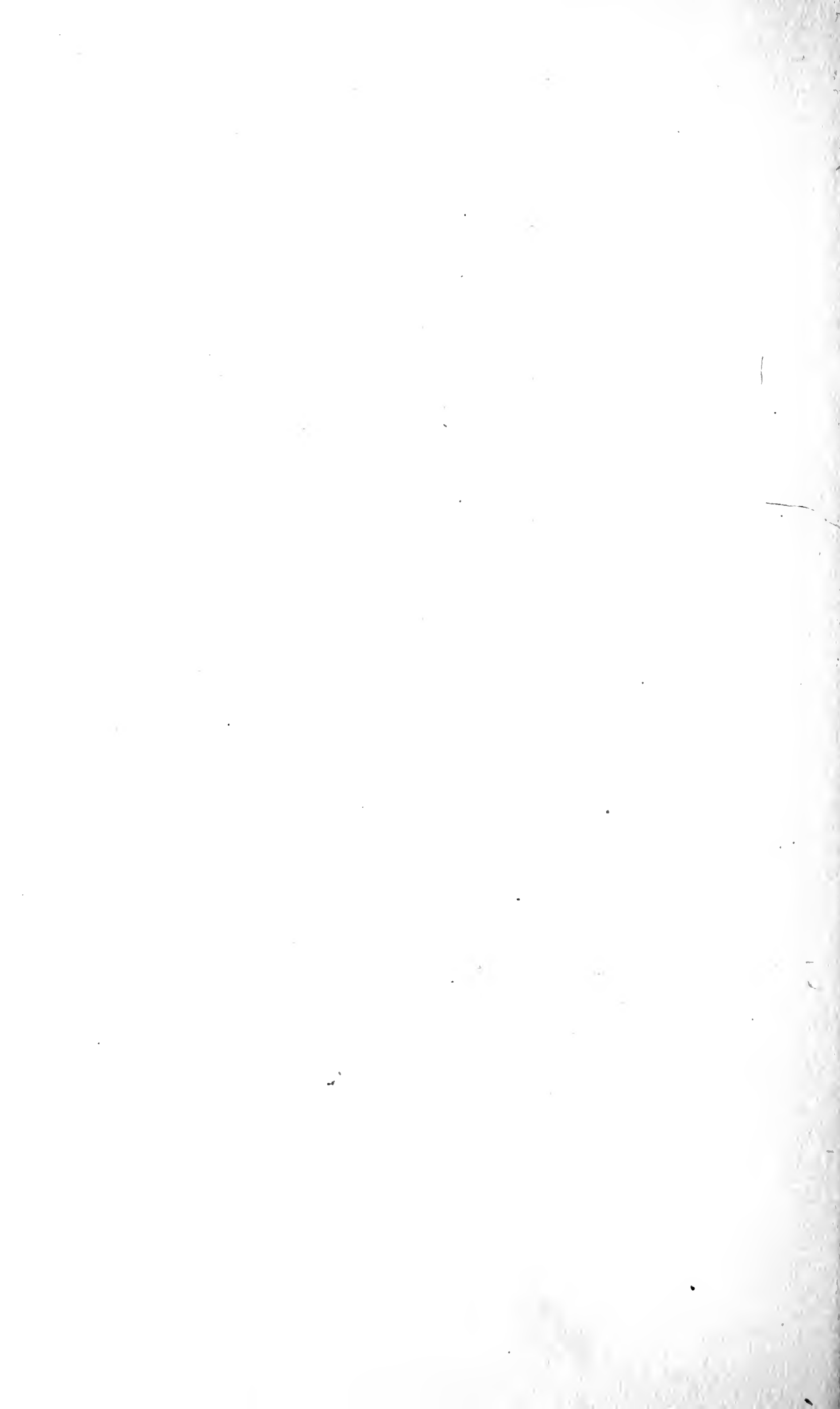
Received a copy of the within Citation the 3 day of Feb. 1914.

J. W. QUICK,
Atty. for Defendant.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[49]**

[Endorsed]: No. 2381. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs.

Northern Pacific Railway Company, a corporation, Defendant in Error. Transcript of Record upon Write of Error to the United States District Court of the Western District of Washington, Southern Division. Received and filed February 19, 1914. Frank D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.



No. 2381

In the United States Circuit Court of Appeals, Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

CLAY ALLEN,
United States Attorney.
MONROE C. LIST,
Special Assistant to United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

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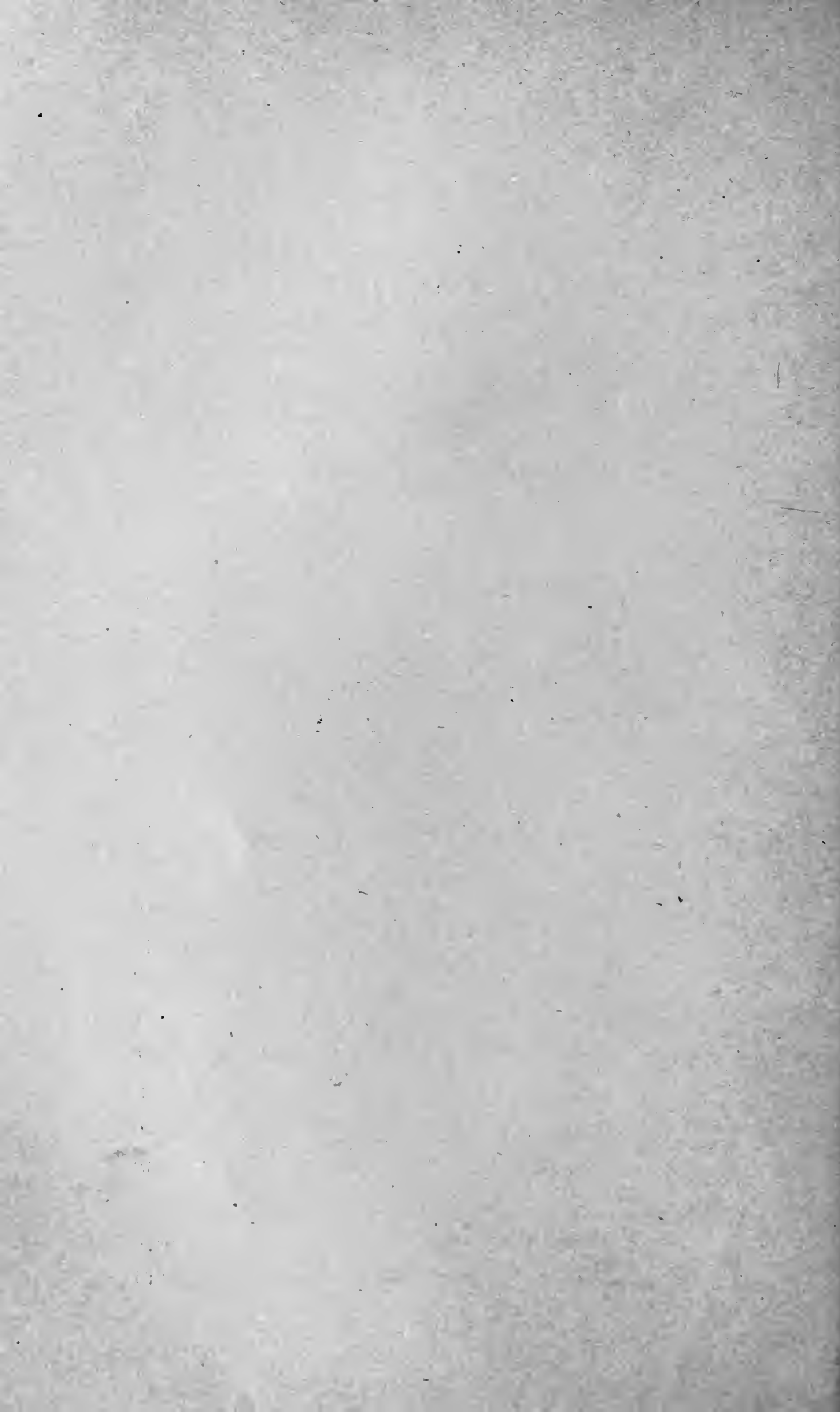
MAY 4 - 1914



In the United States Circuit Court of Appeals, Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

This action was brought by the United States to recover from the defendant $1,500 in penalties for three alleged violations of section 2 of the act of Congress approved March 4, 1907 (34 Stat. L., p. 1415), commonly known as the Federal Hours of Service Act.

That part of section 2 of this act, having reference to employees engaged in train service, reads as follows (the italics are ours and indicate that provision of this section the defendant is charged with having violated):

> SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject

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to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employees of such common carrier shall have been concontinuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; *and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty.*

The complaint filed by the Government was in three counts, the first having reference to the employment of Conductor Thomas Doyle, and reads as follows (Rec., p. 3–4):

Plaintiff alleges that said defendant is and was, during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the act of Congress, known as "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Stat. L., p. 1415), said defendant, having required and permitted its certain conductor and employee, to wit, Thomas Doyle, to be and remain on duty as such upon its line of railroad at and between the stations of Portland, in the State of Oregon, and Tacoma, in the State of Washington, with-

in the jurisdiction of this court, for 16 hours in the aggregate during the 24-hour period beginning at the hour of 1.10 o'clock p. m. on May 12, 1913, to wit, from said hour of 1.10 o'clock p. m. on said date to the hour of 12.30 o'clock a. m. on May 13, 1913, and from the hour of 6.55 o'clock a. m. on May 13, 1913, to the hour of 11.15 o'clock a. m. on May 13, 1913, did then and there require and permit said employee to remain and continue on duty as aforesaid until the hour of 1 o'clock p. m. on May 13, 1913, and when said employee had not had at least eight consecutive hours off duty, as required by said act.

Plaintiff further alleges that said employee, while required and permitted to remain and continue on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said act of Congress said defendant is liable to plaintiff in the sum of $500.

The remaining counts are similar to the first in every respect, except that the second count has reference to the employment of Brakeman B. L. Eddy and the third to Brakeman W. D. Edgerton.

The defendant filed its answer and admitted the allegations of each count "save and except the allegations that said employee while required and permitted to remain and continue on duty as aforesaid

was engaged in and connected with the movement of said defendant's train No. 308, and also the allegation that said defendant is liable to plaintiff in the sum of $500, which said allegations are denied."

The defendant attempted to bring itself within the proviso of section 3 of the act, and with this object in view set up in its answer certain facts as constituting an affirmative defense as to all counts. (Rec., pp. 7–10.) While this answer was undoubtedly demurrable, the plaintiff was content to allow the defendant to show any affirmative defense it might desire regardless of the character of the answer. This answer is not here set forth in detail, but the contentions of the defendant will fully appear in this statement of the case.

The facts adduced at the trial show that the employees in question had been for some time engaged in the operation of two of defendant's passenger trains running between Tacoma and Portland.

One of these trains was known as No. 303, scheduled to leave Tacoma at 1.40 p. m. and to arrive at Portland at 6.45 p. m. the same day. Under the rules of the company the conductor and brakemen were required to report for duty 30 minutes prior to the time set for departure of No. 303; this was known as preparatory time. (Rec., p. 18.)

It will thus be seen that counting both the preparatory and scheduled running time of this train, these employees ordinarily would be on duty, if the train maintained its schedule, 5 hours and 35 minutes before going off duty at Portland.

The second train was known as No. 308, scheduled to leave Portland at 7.25 a. m. and to arrive at Tacoma at 12.35 p. m. the same day. The same preparatory service was required of these employees in connection with this train as in the case of No. 303. (Rec., p. 18.)

Counting both the preparatory and scheduled running time of No. 308, the employees thereon would, if the train maintained its schedule, be on duty 5 hours and 40 minutes.

On May 12, 1913, the employees in question reported for work at 1.10 p. m. and left Tacoma in charge of No. 303 at 1.40 p. m. (Rec., p. 16.) At South Tacoma and near Lake View they were delayed approximately 4 hours and 35 minutes on account of the derailment of an O.-W. R. & N. train operating over the defendant's tracks, causing No. 303 to transfer its passengers around the wreck. (Rec., pp. 19–20.)

After completing the transfer of its passengers to another train, these employees proceeded in charge thereof to Portland. They left Lake View at 6.28 p. m., then having been on duty 5 hours and 18 minutes. (Rec., p. 23.)

The scheduled running time from Lake View to Portland was 4 hours and 40 minutes, but on account of traffic being disarranged No. 303 did not reach Portland and the employees did not go off duty until 12.30 the following morning, then having been on duty 11 hours and 20 minutes. (Rec., p. 20.)

Upon their arrival at Portland it was known to the officials of the company, or could easily have been ascertained, that if these same employees were required and permitted to return to duty the same morning at 6.55, and to proceed to Tacoma in charge of No. 308, they would be on duty 16 hours in the aggregate long before their train could reach Tacoma. (Rec., p. 24.)

No effort whatever was made by the defendant company to place another crew in charge of No. 308, either at Portland or at any place along the line where they had reason to believe the 16-hour period of aggregate service would expire. (Rec., pp. 24, 30.)

The initial terminal of No. 303 was Tacoma and its final terminal was Portland. (Rec., p. 26.)

The initial terminal of No. 308 was Portland and its final terminal was Tacoma. (Rec., p. 27.)

As there was no disputed fact for the jury both sides moved for a peremptory instruction, and the trial court thereupon directed the jury to find for the defendant on each cause of action. Judgment was thereafter entered by the court against the plaintiff and this action dismissed. (Rec., p. 12.)

The Government, plaintiff below, brings this case here upon a writ of error as to counts 1, 2, and 3 upon the following:

ASSIGNMENT OF ERRORS.

1.

The court erred in refusing to peremptorily instruct the jury to find for the plaintiff on the first, second,

and third causes of action of plaintiff's complaint, as was requested by counsel for plaintiff at the conclusion of the taking of testimony in the case. (Rec., p. 33.)

2.

The court erred in peremptorily instructing the jury to find for the defendant on the first, second, and third causes of action of plaintiff's complaint, which request for such peremptory instruction was made by counsel for defendant at the conclusion of the taking of testimony in the case. (Rec., p. 33.)

3.

The court erred in entering final judgment against the plaintiff and dismissal of this action. (Rec., p. 34.)

QUESTIONS INVOLVED.

1. Is any unavoidable accident a license to a carrier to disregard and ignore the provisions and requirements of the Federal Hours of Service Law?

2. If so, what are the limitations of such license and when does it cease to exist?

(a) Does it apply to employees so delayed only until they reach a terminal, or the end of that run?

(b) Does it continue to apply to such employees even after they have reached a terminal, or end of that run, and have been relieved from duty?

(c) Does it continue to apply to them even after they have gone on duty again and have left a terminal and in charge of an entirely different train?

3. In order to excuse itself for continuing in service employees who have already been permitted to be on duty 16 hours in the aggregate in a 24-hour period, is the carrier required to show any causal connection between a delay due to one of the causes set forth in the proviso and its failure to relieve such employees at or before the expiration of 16 hours of aggregate service?

ARGUMENT.

The proviso of section 3 reads as follows:

> *Provided,* That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier, or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.

The questions involved in this case may be considered in a general discussion of this proviso with respect to the limitations it places upon the mandatory provisions of section 2 of the act.

Reading together that portion of section 2 under which this action was brought and the proviso, it seems clear that no "employee who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to *continue* * * * on duty without having had at least 8 consecutive hours off duty," unless the failure to relieve such employee is due to a casualty, or the like.

It was the theory of the defendant that when a train is delayed by some accident, clearly unavoid-

able, such delay operates as a license to the carrier to thereafter disregard the mandatory provisions of section 2 with respect to 16 hours' service. In other words, if the crew in question were delayed by a wreck on its southbound trip, a license authorizing excess service on their part would automatically attach to them; they could thereafter be relieved from duty and be required to return to duty again, with a vested right to continue them in service long after they had been on duty 16 hours, and without being under the slightest obligation to take even ordinary precautions to provide relief. But the great trouble with this defense is that if this so-called license extends from day to day, from one trip to another, there is no reason why it should not also extend to any number of trips; so that a wreck in June might operate to license excess service in July.

Train No. 303 was delayed at Lake View 4 hours and 35 minutes, which the Government admitted was due to an unavoidable accident; but such delay can not avail the defendant as an excuse for any future service required of an employee after he leaves a terminal.

For the sake of illustration, we will suppose that this train was delayed at Lake View 8 hours and 35 minutes, thereafter consuming the same amount of time in getting to Portland that it did at the time in question, so that on arrival there the crew would have been on duty approximately 15½ hours. They are then released from duty for two or three hours, after which they are required to return to duty for the ex-

press purpose of operating a train to Tacoma, well knowing that the crew must be on duty nearly six hours more before they can reach Tacoma; but in spite of this knowledge no effort is made to relieve the crew, either at Portland or by sending out a relief crew from Tacoma. On their arrival at Tacoma the crew have been on duty approximately 20 hours, but instead of relieving them at Tacoma the carrier requires them to continue on duty and return to Portland in charge of another train.

We can not conceive of a more deliberate and willful violation of both the letter and spirit of the law, for the situation last described is similar to the one involved, the difference being but one of degree; yet the only answer the defendant makes is that the wreck at Lake View closed its eyes to conditions and, therefore, was the direct cause of its failure to provide another crew at Portland or to send one out from Tacoma.

Such an argument is so elastic that it will fit almost any situation, and if allowed to prevail will excuse any neglect, oversight, or willful act on the part of the carrier.

Train No. 303, after leaving Lake View, might have been delayed by other wrecks, so that when it reached Portland, say at 6.55 a. m., the crew had been on duty 17 hours and 45 minutes, but instead of being relieved there they are required to operate No. 308 from Portland to Tacoma, and by the time they have finished this run their hours of service have covered a period

of 23 hours. Can it be said that such service would be justified or licensed by reason of the delays to No. 303 before it reached Portland?

There is no material difference between this hypothetical case and the one now under discussion.

In the first place, the employees leave Portland, "a terminal," with full knowledge on the part of the carrier that they *have been* on duty over 16 consecutive hours.

In the case under consideration, the employees left Portland, the same "terminal," with full knowledge on the part of the carrier that they *would be* on duty over 16 hours in the aggregate.

"This law was passed to meet a condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employees themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its purposes may be effected." (*U. S.* v. *K. C. S.* (C. C. A.), 202 Fed. Rep., 828.)

In order to excuse itself for an act, which otherwise would be a violation of the mandatory provisions of section 2, the carrier must bring itself strictly within the letter and reason of the proviso. As was said in *U. S.* v. *Dickson* (15 Pet., 141, 165), quoting from the opinion of Mr. Justice Story, "a proviso carves special exceptions only out of the enacting

clause, and those who set up such exception must establish it as being within the words as well as the reason thereof."

In an action for requiring more than 16 hours' service of an employee, either consecutive or aggregate, we do not believe the carrier can bring itself within the proviso simply by showing that somewhere on its journey the train on which that employee was on duty was delayed by reason of an unavoidable accident.

The carrier must go further than this and show, not only the delay to the train and the cause thereof, but also show a causal connection between such delay and its inability to comply with the requirements of the act. This phase of the case can be no better presented than by a reference to the case of *Newport News & Mississippi Valley Co.* v. *United States* (61 Fed Rep., 488). In delivering the opinion of the court, Lurton, then circuit judge, said:

> The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character described as "other accidental causes"; that the use of the disjunctive "or" after "storm" indicates a purpose to except detentions due to cause not the act of God, and described by the term "accidental"; that this construction finds support in section 4388, which imposes the penalty

only upon such carriers as "knowingly and willfully" fail to comply with the requirements.

This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm therefore he should be excused.

It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable by reason of a storm to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm" the carrier must show not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes * * *."

An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention, but an effect of that negligence.

Did the defendant show any causal connection between the derailment near Lake View and the service required of the employees in question?

This question must be answered in the negative. The derailment occurred over 10 hours before No. 303 reached its final terminal, Portland, at which place the crew were relieved from duty, and over 16 hours before these same employees were required and permitted to return to duty again.

In other words, in answer to the Government's charge that it required more than 16 hours of aggregate service of certain employees, the defendant contended that there was a causal connection between this derailment, which occurred about 2 p. m., May 12, and its failure to relieve these employees at or before 11.15 a. m., the following day, at which time the employees had been on duty 16 hours in the aggregate. This was over 21 hours after the derailment occurred and approximately 17 hours after No. 303 was clear of the derailment and had started on its journey. And this the defendant contended, notwithstanding the fact that in the interim these employees had reached Portland, "a terminal," and the end of that run; had remained off duty at "a terminal" over six hours, and had been permitted and required to return to duty again and to leave "a terminal" in charge of No. 308, the carrier knowing full well that long before that train could reach Tacoma the service required of these employees would be over 16 hours in the aggregate.

In view of the fact that the record does not disclose a scintilla of evidence showing the least causal connection between the derailment at Lake View and the service required of the employees in question, but, on the contrary, affirmatively discloses the fact that such was the result of nothing more nor less than wanton neglect on the part of the carrier, plaintiff contends that the judgment of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted.

CLAY ALLEN,
United States Attorney.
MONROE C. LIST,
Special Assistant to
United States Attorney.

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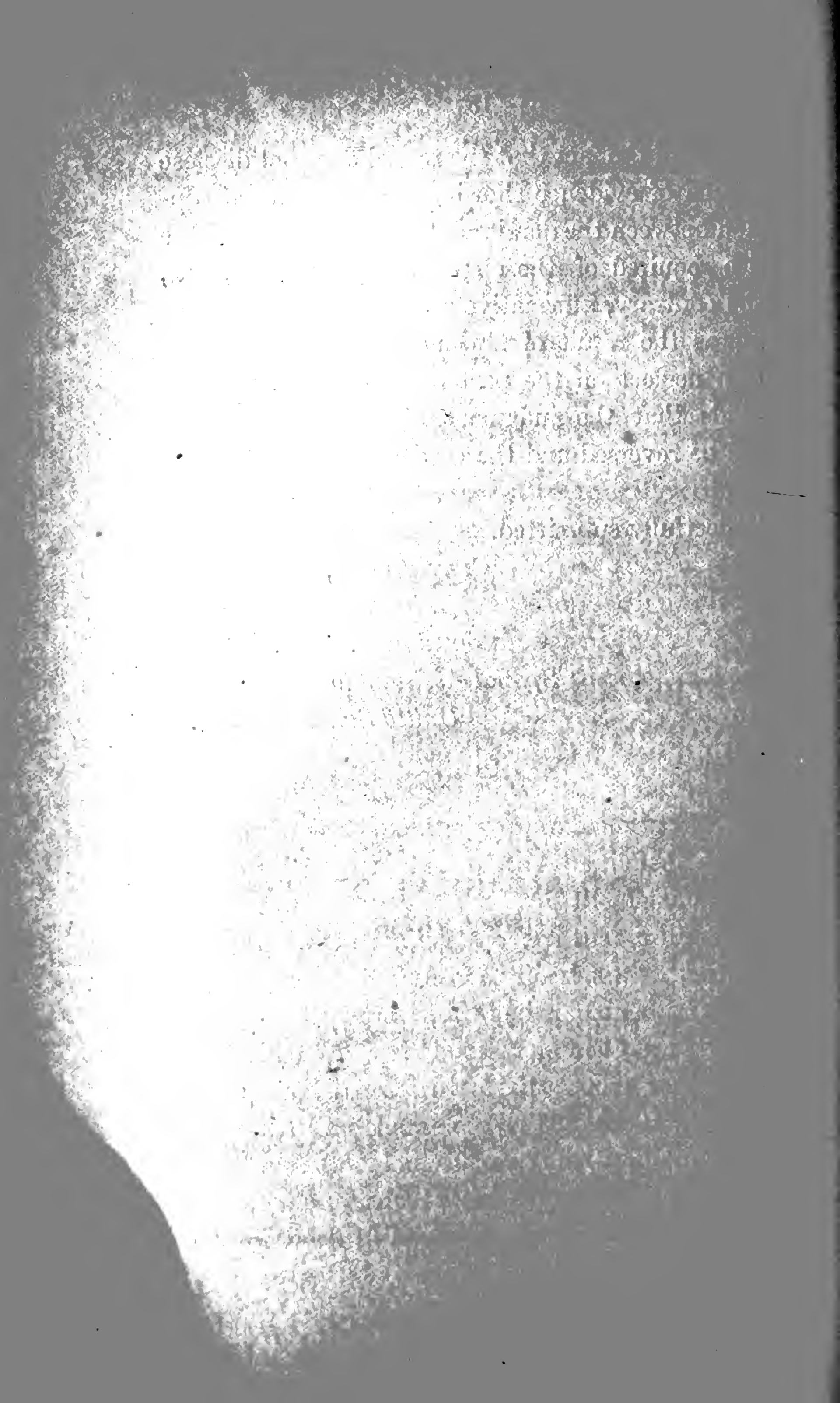

No. 2381

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Defendant in Error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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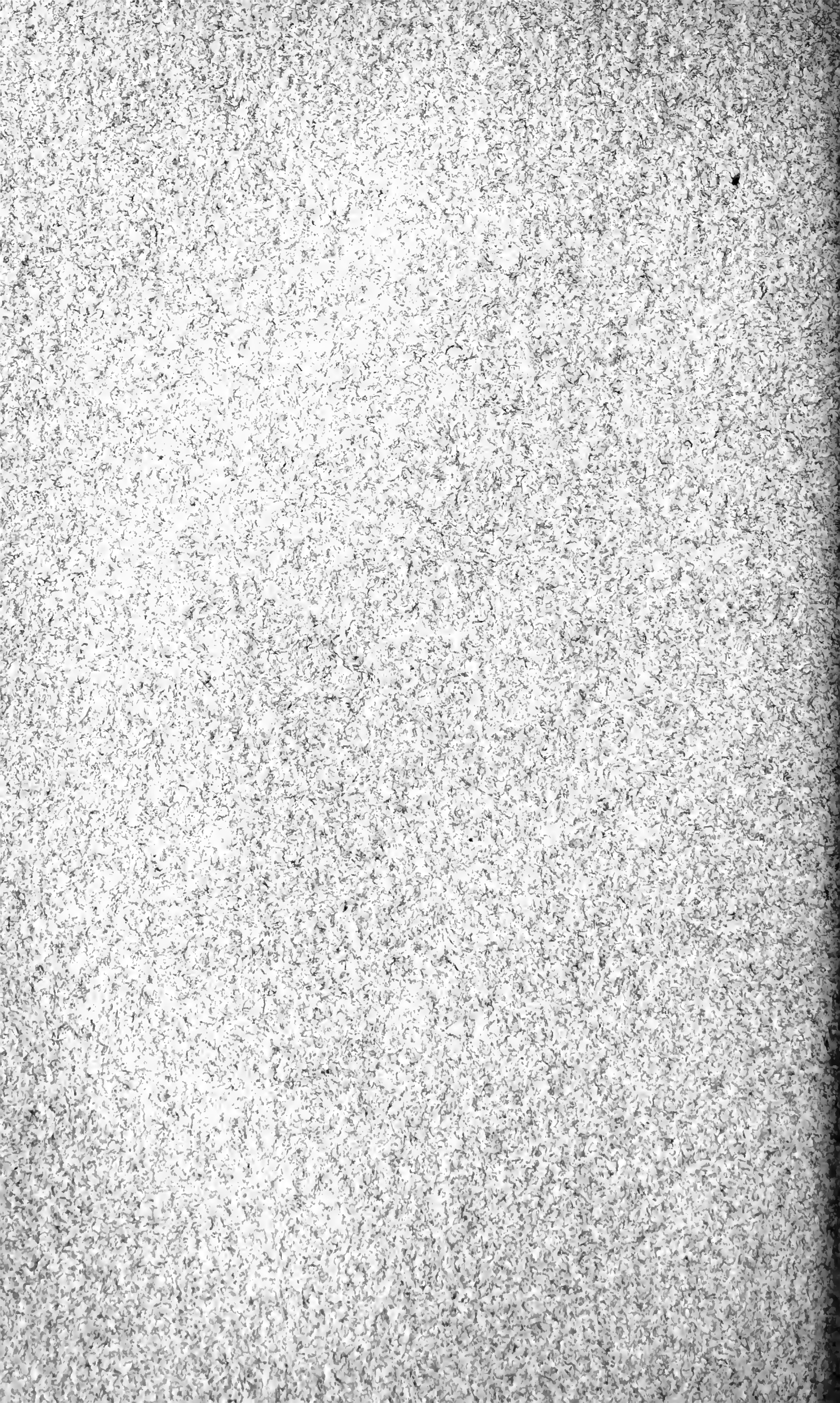

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THE UNITED STATES OF AMERICA,
Plaintiff in Error,

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BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

In this action the evidence shows that the run of the train crew was from Tacoma, Washington, to Portland, Oregon, on passenger train No. 303, and return from Portland to Tacoma on passenger train No. 308.

Train 303 was scheduled to leave Tacoma at 1:40 P. M. and arrive at Portland at 6:45 P. M., This would make the time of the crew on duty 5 hours 35 minutes, including the 30 minutes preparatory time.

Train 308 was scheduled to leave Portland at

7:25 A. M. and arrive in Tacoma at 12:35 P. M., making the time of the crew on duty, including preparatory time 5 hours 40 minutes.

If the trains made their scheduled time, the crew was off duty at Portland 12 hours and at Tacoma 24 hours 35 minutes.

It is shown that between the stations of South Tacoma and Lakeview there is a single track over which was operated the trains of the Northern Pacific, Great Northern and Oregon-Washington Railroad & Navigation Companies, a total of 28 passenger trains daily, beside a large number of freight trains.

On May 12, 1913, train No. 303 left Tacoma at 1:40 P. M. (on schedule time) and was due to meet passenger train No. 362 of the Oregon-Washington Railroad & Navigation Company at the station of South Tacoma at 1:56 P. M. Train No. 362 was derailed between Lakeview and South Tacoma at about 1:50 P. M. (Record p. 22). This derailmen tore up the track, over-turned the engine and coaches of 362, and prevented train 303 from proceeding on to Portland until about 6 o'clock P. M., when the crew and passengers of train 303 were transferred to passenger train 314, which had come up from Portland. Passenger train 314, with the crew and passengers of 303, was then backed to Centralia where it was turned around and then proceeded to Portland, reaching there at 12:30 May 13th. This same crew after being off duty about six

hours and a half returned to Tacoma on its regular run on train 308, and in doing so was on duty about 17 hours without having had 8 hours off duty. At the time train 303 left Tacoma, Chief Dispatcher J. L. Alsip was on duty and by reason of the wreck of train 362, which demoralized the system and brought to the train dispatcher innumerable difficulties, remained at work until 10:30 or 11 o'clock that night instead of leaving, as ordinarily, between 6 and 6:30. (Record 25). By reason of this condition of traffic the night Chief Dispatcher was also busy in routing the trains, which had been thrown off their schedule, and making disposition of the traffic, which entailed a great amount of work, care and anxiety by reason of the wreck. This condition gave to the dispatchers no time or opportunity to check up the time of the various train crews, or give their attention to ordinary matters of detail.

Thomas Doyle was the conductor on trains 303 and 308 and had been a passenger conductor for the defendant for over twenty years and had been on this particular run between fifteen and twenty years. (Record p. 28). The defendant had issued bulletins, explaining the Hours of Service Law, and warning train crews against working over sixteen hours, and Mr. Doyle was fully advised in regard thereto. (Record p. 29).

It did not occur to Mr. Doyle that his crew would be out more than sixteen hours and it was

not called to his attention until the next day after his return on No. 308 (which would be May 14) when it was first called to his attention by the train dispatcher, who had discovered the overtime when checking up the number of hours put in by this crew. (Record pp. 29-30). That the train dispatcher had had no opportunity to check the matter up before this time on account of the demoralized condition of the service as a result of the wreck, is clearly shown by the evidence.

Counsel for the Government criticises the defendant for not relieving the crew at Portland, insisting that as Portland was one of the terminals for these trains, it should have been known that the crew could not return on 308 and reach Tacoma without being in service more than sixteen hours. While this is true under ordinary conditions, it is shown by the evidence that an extraordinary situation prevailed on account of the wreck of train 362. This extraordinary condition prevented the dispatchers from knowing at the time that the crew would be in service in excess of the statutory period. Again it is not shown by the evidence that there was any other train crew at Portland which could have brought out train 308. It is shown that trains 303 and 308 constitute a round trip service and that the only time there is ever a change in these crews was "occasionally for personal reasons Mr. Doyle and the other crew would change. It was permissible on application to the Superintendent, but generally speaking this

was his run for years and years." (Record 20). It is here shown that whenever this crew does change from its regular run it is on application to the Superintendent so that previous arrangements therefor may be made. Therefore when this crew was delayed on train 303 by reason of an unavoidable casualty, it affected the crew until it returned to its terminal at Tacoma, and the fact that the train on which they returned was designated by a different number was no more important than if the number of train 303 should be changed on its trip to Portland at some station between Tacoma and Portland. It was at all times the same crew performing the same service.

Counsel also in their brief call attention to the fact that no effort was made to relieve this crew while enroute. On the trial of the case counsel for the Government asked Conductor Doyle:

"Q. And they could have relieved you possibly at some point up the line?

"A. I do not know hardly how they could get a crew out there.

"Q. Did they have a right to do that?

"A. I could not answer that. I do not think —there was no train out there in time to get a crew out to relieve us." (Record p. 30).

In addition to this explanation by the witness, which was the only evidence offered on this question, it had been fully shown by the evidence that on account of the unusual condition which was not

to be anticipated there had been no opportunity to check up the service of this crew until the injured had been cared for, the wreck cleared away, the various trains, which had been tied up, again set in motion, and the great stress under which the dispatcher's office was necessarily placed to a certain extent relieved, which was after the arrival in Tacoma of train 308.

It was conditions of this kind which sometimes, but exceptionally arise, that prompted Congress to adopt the proviso in Section 3 of the act to make provision for similar cases arising out of unforseen conditions. It is well known that men laboring to relieve a situation where lives have been lost and persons injured, as the result of a disastrous wreck, cannot use the foresight, coolness and deliberation which they do under ordinary conditions, and Congress intended to make provision for such.

Each cause of action in the complaint contained the following allegation:

"Plaintiff further alleges that said employee, while required and permitted to remain and continue on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic."

The evidence showed that the actual service in connection with train 308 from Portland to Tacoma was only 5 hours 40 minutes, including preparatory time, so there was no violation of the

law solely in connection with train 308. In order to make a pretense of a violation of the law, it is necessary to consider the operation of train 308 in connection with train 303 as forming a continuous round trip, which, in fact, it was. Then if considered in connection with train 303 as forming a continuous round trip, the effect upon this trip by a wreck, as shown by the evidence, brings the case within the exception.

Counsel for the government find it necessary to sustain their contention to argue, or rather to assert, that there was no casual connection between the derailment of the O.-W. R & N. train and the overtime. But this is to beg the whole question. The testimony was directly to the contrary. It appears that the method of checking up overtime in use was through and by the dispatcher's office in charge and control of the train's movement. In ordinary operation this is a sure check and enables the carrier to comply with the law. But in this instance the obstruction of a single track over which twenty-eight passenger trains moved every twenty-four hours, eighteen of which would move during the day or early evening, to say nothing of many freight trains; the necessity for arranging and caring for the movement of wrecking outfits, so unavoidably overwhelmed the chief dispatcher's office that he was wholly unable to check up and care for possible minute violations of the hours of service law in case of a particular crew in charge of a particular

train. Under these circumstances, therefore, how can it be justly and truthfully claimed that there was no causal connection between the alleged minute violation of the hours of service law here claimed and the wreck of the O.-W. R. & N. train? How can it justly be claimed by the government that the chief dispatcher, a man holding one of the most difficult and responsible positions in the operating department of the carrier, was guilty of "a deliberate and wilful violation of both the letter and spirit of the law?" because, in the midst of the press and anxiety of his most exacting duties he did not anticipate that a minute violation of the hours of service law might possibly occur in connection with the movement of one of the twenty-eight trains over this line, in addition to the numerous freight and construction trains. We submit that counsel cannot really mean to charge the chief dispatcher (who must be the party at fault if any one be at fault), with a "deliberate and willful violation of the law" under these circumstances. Had the dispatcher been of this disposition, he could never have held this responsible position. Had he not been a man of resource, intelligence and high capacity he could not have handled the situation at all. Counsel has been misled by an excess of zeal in the discharge of his duty into casting unmerited aspersions upon a highly deserving employee. We submit that the proviso must have been intended to cover just such a situation as arose here. The business of transportation

must be carried on by the average man, and the law does not exact a greater measure of efficiency and care than is possessed by the average man. If there was short-coming in this instance it is because a man is not an automaton, and not because there was a "wilful and deliberate violation of the law" upon the part of an employee who was doing all that man could do to handle a highly difficult situation. Counsel have ignored this aspect of the situation. He has assumed gross neglect, incompetence or a willful and deliberate violation of the law because the dispatcher, in the midst of a fatal wreck and congestion of twenty-eight passenger trains on a 150-mile line did not exercise superhuman care to discover that possibly a minute violation of the hours of safety law would occur in the case of a particular train crew. It may appear to counsel in the quiet and seclusion of his office that this condition should have been anticipated. But let him put himself in the place of the chief dispatcher and judge his conduct in the light of the conditions existing at the time. Doing so who shall say that he was grossly negligent or guilty of a wilful and deliberate violation of the law?

We submit that the learned district judge could not do otherwise than direct a verdict for defendant, because the case made was clearly within the proviso of the act.

But if mistaken in this, then at least it was

for the jury to say whether the wreck of the O.-W. R. & N. train was the proximate cause of the overtime. It was for the jury to say whether, *in view of all the facts and circumstances existing at the time,* the chief dispatcher was guilty of negligence or of a wilful violation of the law for not anticipating the minute infraction that occurred. While the facts are not disputed it does not follow that a verdict should have been directed for the government, for there remains the inferences of negligence, vel non, to be drawn therefrom, and, to say the least, reasonable men might well reach a negative conclusion. In no event and under no circumstances was the government entitled to a directed verdict, and no other error is assigned. It is not assigned as error that the court erred in refusing to submit the question to the jury. It follows, therefore, that the case cannot be reversed on that ground.

We submit that the verdict and judgment below are right, and should be sustained.

Respectfully submitted,

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No. 2395

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

CENTRAL NATIONAL FIRE INSURANCE COMPANY OF CHICAGO, ILLINOIS, a Corporation,

Plaintiff in Error,

vs.

WILLIAM BLACK,

Defendant in Error.

VOLUME I.
(Pages 1 to 224, Inclusive.)

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

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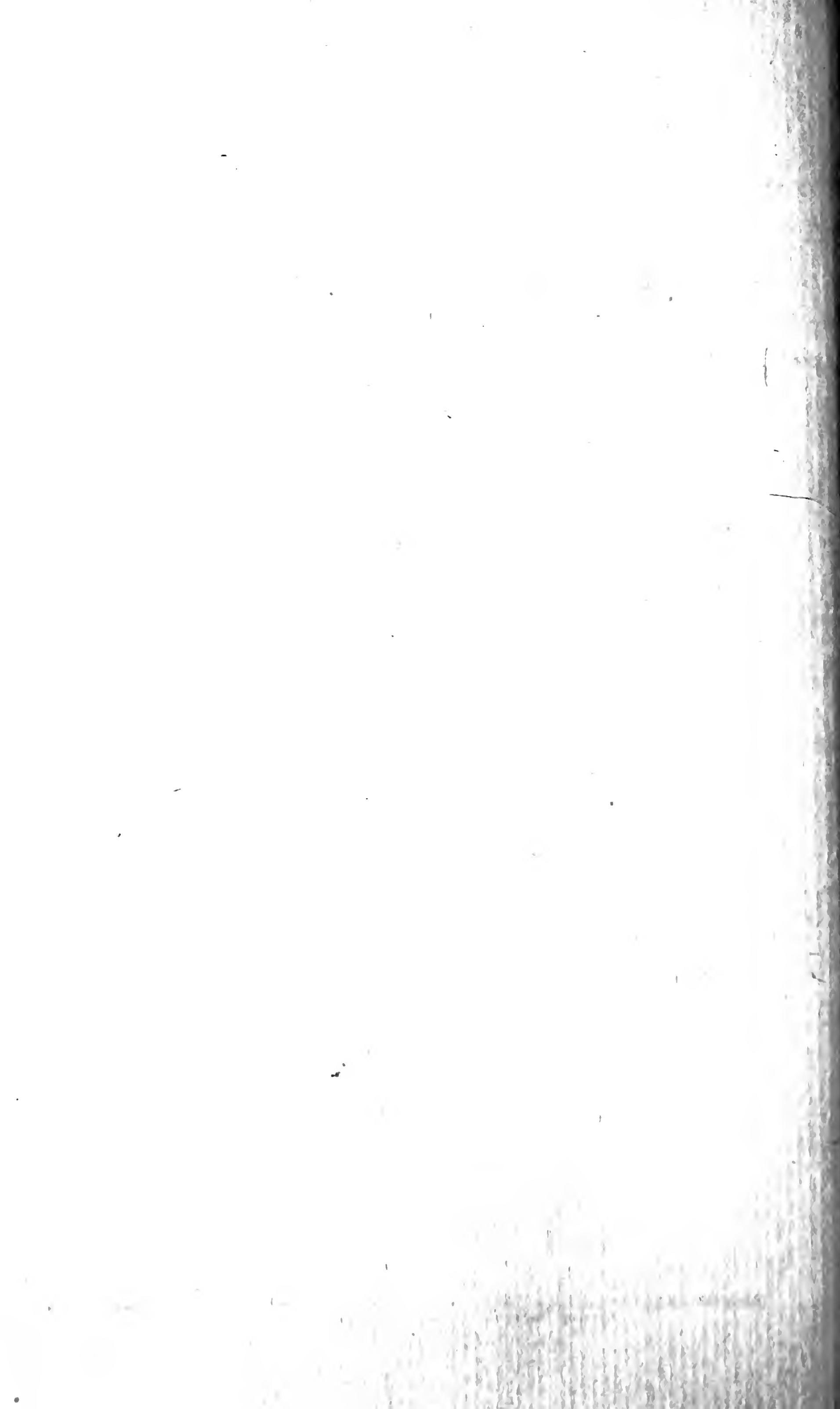

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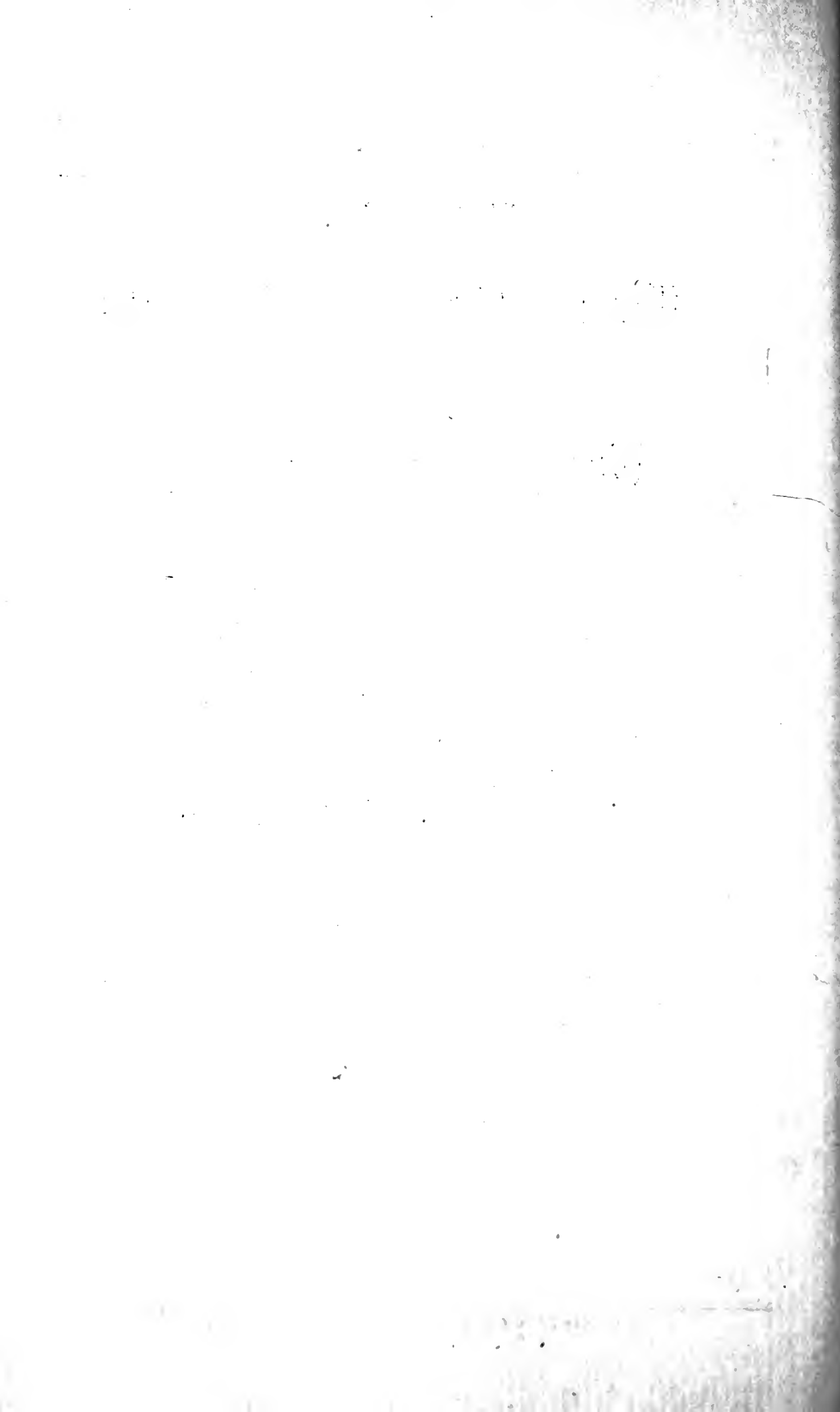

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Names and Addresses of Counsel.

JAMES COLE, Esquire, #917 Board of Trade Building, Portland, Oregon;

BARTLETT COLE, Esquire, #917 Board of Trade Building, Portland, Oregon; and

GEORGE COLE, Esquire, #917 Board of Trade Building, Portland, Oregon,

Attorneys for the Plaintiff in Error.

J. J. BRUMBACH, Esquire, Ilwaco, Washington;

CHARLES E. MILLER, Esquire, South Bend, Washington;

MAURICE A. LANGHORNE, Esquire, Tacoma Building, Tacoma, Washington;

E. M. HAYDEN, Esquire, Tacoma Building, Tacoma, Washington; and

FREDERIC D. METZGER, Esquire, Tacoma Building, Tacoma, Washington,

Attorneys for Defendant in Error.

Praecipe for Transcript.

To the Clerk of the Above Court:

You will please prepare and certify to constitute record on appeal in the above case copies of the following papers; omitting all captions, verifications, acceptances of service and other endorsements, excepting on the first paper:

1. This praecipe;
2. Complaint and exhibit; petition, bond and order of removal;

3. Amended answer;
4. Reply to amended answer;
5. Interrogatories propounded to plaintiff under Sec. 1226, Ballinger's Code Washington;
6. Answers to interrogatories;
7. Stipulation as to tender (dated Oct. 23, 1913);
8. Verdict;
9. Judgment;
10. Motion for new trial;
11. Order denying *motion new* trial;
12. Order extending time for bill of exceptions to Jan. 10, 1914;
13. Bill of exceptions and order settling;
14. Assignments of error;
15. Petition for writ of error and order allowing, etc.;
16. Bond on writ of error;
17. Writ of error;
18. Citation.
19. And the following exhibits:

Plaintiff's Exhibit 2;
Plaintiff's Exhibit 3;
Plaintiff's Exhibit 4 (writing only); [1*]
Defendant's Exhibit "A-8"—Inventory;
Defendant's Exhibit "A-5" (Nos. 444, dated June 16, 1908, and No. 476, dated June 23, 1908);
Defendant's Exhibit "B"—Bank statement;
Defendant's Exhibit "C"—Letter;
Defendant's Exhibit "D"—Letter;
Defendant's Exhibit "E"—Letter;

*Page-number appearing at foot of page of original certified Record.

Defendant's Exhibit "F"—Letter;
Defendant's Exhibit "G"—Letter;
Defendant's Exhibit "H"—Letter;
Defendant's Exhibit "I"—Letter dated Oct. 11, 1912;
Defendant's Exhibit "J"—Letter;
Defendant's Exhibit "K"—Letter;
Defendant's Exhibit "L"—Letter;
Defendant's Exhibit "M"—Letter;
Defendant's Exhibit "Y" (parts only of this exhibit, being bill of Apr. 2, 1908, for 5 bbls. Green River, etc.; bill of June 26, 1909, for 5 bbls. Old Crowe and statement following);
Defendant's Exhibit "X" (last page only).

COLE & COLE,

Attorneys for Plaintiff in Error, Central National Fire Ins. Co.

[Endorsed]: "Filed in the U. S. District Court, Western District of Washington, Southern Division. Jan. 8, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." **[2]**

In the Superior Court of the State of Washington, in and for the County of Pacific.

1297.

WILLIAM BLACK,

Plaintiff,

vs.

CENTRAL NATIONAL FIRE INSURANCE COMPANY OF CHICAGO, ILLINOIS,

Defendant.

Summons.

The State of Washington to the Said Central National Fire Insurance Company of Chicago, Illinois, Defendant.

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint which will be filed with the clerk of said court and a copy of which is herewith served upon you.

J. J. BRUMBACH,
CHAS. E. MILLER,
Attorneys for Plaintiff.

P. O. Adresss, South Bend, Wash. [3]

Complaint.

The plaintiff complains of the defendant above named and alleges:

1. That the defendant is a corporation duly

created by and under the laws of the State of Illinois pursuant to an act of the legislature of said State of Illinois and having its principal office at the city of Chicago in that State.

2. That the plaintiff was the owner of a certain stock of merchandise consisting principally of wines, liquors, cigars, beer and soda and mineral waters kept for sale by him, in the two-story, shingle roof, frame building and adjoining and communicating additions thereto, occupied by plaintiff as a saloon and situated on lot 6, in block 6, of Tinker's north addition to Long Beach, Pacific County, Washington, at the time of its insurance and destruction by fire as hereinafter mentioned.

3. That on the 18th day of June, 1912, at said Long Beach, Washington, in consideration of the payment by the plaintiff to the defendant of the premium of $137.50, the defendant by its agents duly authorized thereto, made its policy of insurance in writing, a copy of which is annexed hereto, marked Exhibit "A" and by this reference made a part hereof.

4. That on the 27th day of June, 1912, said two-story frame building and the store furniture and fixtures contained therein, together with the plaintiff's above-described stock of merchandise and the goods, wares and merchandise kept for sale by the plaintiff, were totally destroyed by fire.

5. That the plaintiff's loss thereby was Five Thousand Dollars.

6. That on the 23d day of August, 1912, he, the plaintiff, furnished the defendant with proof of his

said loss of said [4] stock of merchandise and otherwise performed all the conditions of said policy on his part.

7. That the defendant has not paid said loss nor any part thereof.

Wherefore the plaintiff demands judgment in the sum of Five Thousand Dollars, for his costs in this behalf expended, and such other relief as the Court shall deem appropriate.

J. J. BRUMBACH,
CHAS. E. MILLER,
Attorneys for Plaintiff.

P. O. Address, South Bend, Wash.

Filed Dec. 6th, 1912. E. A. Seaborg, Clerk.

Exhibit "A"—Stock Policy.

No. 590,757. $5000.00

Standard Fire Insurance Policy. [5]

Central National Fire Insurance Company,
Chicago, Illinois.

Incorporated 1909. Stock Company.

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED AND OF one hundred & Dollars premium does insure Wm. Black for the term of one year from the 18th day of June, 1912, at noon, the 18th day of June, 1913, at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

Amount $5000—Rate 2.75—Premium $137.

MERCHANDISE FORM.

$5000.00 on his stock of merchandise, consisting principally of wines, liquors, cigars, beer, soda & mineral water and all other goods, wares and merchandise not more hazardous kept for sale by assured, while contained in two-story shingle roofed frame building and adjoining and communicating additions thereto, while occupied as saloon and situate on lot 6, Blk. 6, Tinker's north add. to Long Beach, Pacific Co., Wash.

$ nil on store furniture and fixtures while contained in said building.

$ nil other concurrent insurance permitted.

Powder and Kerosene.—Permission granted to keep for sale not to exceed fifty pounds of gunpowder and five barrels of kerosene oil, the latter to be of not less than the United States standard of 110 degrees, neither to be handled or sold by artificial light.

Electric Lights.—Permission for electric lights, it [6] being agreed that wires shall be doubly coated with approved insulating material, and protected where they enter buildings, by porcelain or hard rubber insulators, and shall also have fusible cutoffs.

Lightning Clause.—This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in

the property and subject in all other respects to the terms and conditions of this policy: Provided, however, if there shall be any other insurance on said property this company shall be liable only *pro rata* with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not; and provided further that, if dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this company shall not be liable for any loss or damage to such property resulting from any electrical injury or disturbances, whether from artificial or natural causes, unless fire ensues, and then for the loss by fire only.

Attached to and forming a part of policy No. 590,-757 of the Central National Fire Insurance Co. of Chicago, Illinois.

HENRY KAYLER,
Agent.

Attached to and forming a part of policy No. 590,-757, Agency at ——.

CENTRAL NATIONAL FIRE INSURANCE COMPANY.

In consideration of $ nil and of the following warranties by the assured, permission is hereby given for using the [7] —— gasoline lamp, by piped into it being warranted by the assured that the reservoir thereof shall be filled by daylight only, when the lamp is not in use; that no fire, blaze, or artificial light shall be permitted in the room where and when such reservoir is being filled; that no gasoline, except such as is contained in such reservoir,

shall be kept within the building; and that not more than five gallons which shall be contained in and automatic closing metallic can shall be kept on the premises connected with said building.

Caution.—The danger of gasoline lamps is not so much in themselves as in having the gasoline on the premises. At ordinary temperature gasoline continually gives off inflammable vapor, and a light some distance from it will ignite it through the medium of this vapor. It is said that one pint of gasoline will imptrgnate 200 cubic feet of air and make it explosive, and it depends upon the proportions of air and vapor whether it becomes a burning gas or a destructive explosive. Beware of any leaks in cans, and never forget how dangerous a material you are handling. Never attempt to fill the lamp reservoir while the lamp is burning, or if any light is in the room. A little carelessness may hazard your life as well as property.

HENRY KAYLER,
Agent.

This policy is made and accepted subject to the foregoing stipulations and conditions and the stipulations and conditions stated in detail on the reverse side of this contract, which form a part hereof as full as if recited herein, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this Company [8] shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon

or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured so written or attached.

IN WITNESS WHEREOF, this company has executed and attested these presents, but this policy shall not be valid until countersigned by the duly authorized agent of the company at

F. M. RICE, JAMES B. HABBS,
Secretary. President.
General Manager.

COUNTERSIGNED AT Long Beach, Wash., this 18th day of June, 1902.

HENRY KAYLER,
Agent. [9]

STIPULATIONS AND CONDITIONS.

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damages occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however *cause*, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of *like and* quality; said ascertainment or estimate should be made by the insured and this Company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum of

which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this Company in accordance with the terms of this policy. It shall be optional, however, with this Company to take all of any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this Company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud, or false swearing *ny* the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement [10] endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased

by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises, for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building or a ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage; o*f* if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of the insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, na*pt*ha, nitro-glycerine, or other explosives, phosphorus or petroleum [11] or any of its products of greater inflammability than kerosene oil of the United States Standard (which last may be used for lights and kept for sale according but in quantities, not exceeding five barrels, pr*i*vided

it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by neglect of the insured to use all reasonable means to sa*m*e and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or light*nign,* but liability for direct damages by light*nign* may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deed, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, d*e*awings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools or property held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or [12] otherwise; nor for any greater

proportion of the value of plate glass, frescoes and decorations than that which this ;olicy shall bear to the whole insurance on the building described.

If an application, survey, plan or description of property be referred to in this policy, it shall be a part of this contract and warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this Company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this Company at the time of renewal of this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the Company by giving five days' notice of such *cnn*ellation. If this policy shall be canceled as hereinbefore provided or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy of last renewal, this Company retaining the customary short rate; except that when this policy is canceled by this Company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this Company, an interest under this policy shall exist in favor of a mortgage or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interests as shall be written upon, at-

tached or appended [13] hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall for the ensuing five days only, cover the property so remobed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more location be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insired shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this Company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge, and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof, and the

amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property and a copy of all the descriptions and schedules all policies and changes in the title, use, occupation, [14] location, possession, or exposure of said property since the issuing of this policy; by whom and for what purpose and building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destro*u*ed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested *appraiser,* the

insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall [15] bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any procision or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been *rr*quired.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability

for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery, by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after **[16]** the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached or appended hereto. **[17]**

State of Washington,
County of Pacific,—ss.

I, William Black, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; that I have read the foregoing complaint, know the contents thereof and that the same and the

whole thereof is true as I verily believe.

WILLIAM BLACK.

Subscribed and sworn to before me this 3d day of December, 1912.

[Seal] J. J. BRUMBACH,

Notary Public for the State of Washington, Residing at Ilwaco, Washington. [18]

Petition for Removal to the United States District Court.

Comes now the Central National Fire Insurance Company, of Chicago, Illinois, a corporation, the defendant in the above-entitled action, and petitions the above-entitled court, and sets forth and alleges as follows:

I.

That your petitioner, Central National Fire Insurance Company, of Chicago, Illinois, the defendant in the above-entitled action, is now and was at the commencement of said action, and at all times therein mentioned, a corporation created by, and organized and existing under and by virtue of the laws of the State of Illinois, and is now and was at the commencement of the above-entitled action a citizen and resident of the State of Illinois.

II.

That plaintiff, William Black, is now and was at the commencement of this action, and for a long time prior thereto, a citizen and resident of the State of Washington, residing in Pacific County, Washington.

III.

That said William Black commenced the above-

entitled action in the above-entitled court to recover from the defendant herein the sum of five thousand dollars and the costs and disbursements of the action, claiming and alleging said sum to be due said plaintiff from said defendant, arising out of an alleged contract of insurance claimed to have been entered into by and between the plaintiff and defendant.

IV.

That said sum and said cause of action and the subject matter of said cause of action is a matter in dispute between [19] the plaintiff and defendant and defendant has a good, valid and meritorious defense to said action and intends to defend the same.

V.

That the summons in the above-entitled action was served on the Insurance Commissioner of the State of Washington on the 23d day of December, 1912; that the time for pleading to the complaint filed in said cause, under the laws of the State of Washington, has not yet expired, as forty days have not elapsed since the service of said summons was made.

VI.

That your petitioner herein has not yet appeared or pleaded in said action; that the matter in dispute, exclusive of interest and costs, exceeds the sum of $2,000.00, to wit, the sum of $5,000.00.

Your petitioner herewith tenders a good and sufficient bond, according to law, for its entering in the District Court of the United States for the Western District of Washington, on the 1st day of its next session, a copy of the record of this action, and for paying all costs that may be awarded in said District

Court if said court shall hold that this action was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays that this Court will proceed no further herein except to make an order of removal of this action to said District Court, to accept said bond, and to cause the record herein to be removed to said District Court.

CENTRAL NATIONAL FIRE INS. CO.,
By FRANK E. DOOLY, Agt.,
Petitioner.

COLE & COLE and
W. F. MAGILL,
Attorneys for Petitioner.

Filed January 31st, 1913. E. A. Seaborg, Clerk. **[20]**

State of Oregon,
County of Multnomah,—ss.

I, Frank E. Dooly, being first duly sworn, depose and say that I am the agent of the defendant in the above-entitled action; and that the foregoing petition is true as I verily believe. That I have personal knowledge of the facts and matters therein alleged and set forth.

FRANK E. DOOLY.

Subscribed and sworn to before me this 30th day of January, A. D. 1913.

[Seal] BARTLETT COLE,
Notary Public of the State of Oregon. **[21]**

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, the Central National Fire Insurance Com-

pany, of Chicago, Illinois, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and the United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland and regularly and duly authorized, empowered and qualified, under the laws of the State of Washington, to become a surety on bonds, undertaking, etc., are held and stand firmly bound unto William Black, the above-named plaintiff, in the penal sum of five hundred dollars ($500.00), for the payment whereof, well and truly to be made unto the said William Black, his heirs or assigns, we bind ourselves, our representatives, successors and assigns, jointly and firmly by these presents, upon condition nevertheless, that WHEREAS, the said Central National Fire Insurance Company, of Chicago, Illinois, the defendant above named, has filed its petition with the Superior Court of the State of Washington in and for the County of Pacific, for the removal of a certain cause therein pending wherein the said William Black is plaintiff, and said Central National Fire Insurance Company, of Chicago, Illinois, is defendant, to the District Court of the United States for the Western District of Washington:

NOW, THEREFORE, if the said Central National Fire Insurance Company shall enter into the District Court of the United States for the Western District of Washington, within thirty days from the date of the filing of the petition for removal herein, a copy of the record in said action, and shall well and truly pay all costs that may be incurred in said Dis-

trict Court of the United States if said Court shall hold that [22] said action was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

IN WITNESS WHEREOF, we, the said Central National Fire Insurance Company, of Chicago, Illinois, and The United States Fidelity and Guaranty Company, have caused this instrument to be executed by our duly qualified officers, this 30th day of January, 1913.

CENTRAL NATIONAL FIRE INSURANCE COMPANY, of Chicago, Ill.
FRANK H. DOOLY, Agt.,
Principal.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.
By DOUGLAS R. TATE,
Its Attorney in Fact,
Surety.

Countersigned: C. W. RORABECK,
Local Agent.

Filed January 31st, 1913. E. A. Seaborg, Clerk.

Jan. 31, 1913.

I hereby approve the within bond and the sureties thereon.

EDWARD H. WRIGHT,
Superior Judge. [23]

Order of Removal.

WHEREAS, the defendant, Central National Fire Insurance Company, of Chicago, Illinois, having filed

and presented its petition and bond for removal of this cause to the District Court of the United States for the Western District of Washington, and the Court finding the same to be in due form and the sureties to be good and sufficient, and further finding that this is a proper cause for removal to said Court, plaintiff being a citizen and resident of the State of Washington, and defendant a citizen and resident of the State of Illinois, the Court orders that no further proceedings be had in this action in the above-entitled court, and that the same be removed to the District Court of the United States for the Western District of Washington.

Dated this 31st day of January, 1913.

EDWARD H. WRIGHT,
Judge.

Bond to be filed in the sum of $500.00.

WRIGHT, J.

Filed Jany. 31st, 1913. E. A. Seaborg, Clerk. [24]

State of Washington,
County of Pacific,—ss.

I, E. A. Seaborg, County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of Pacific, hereby certify the within and foregoing to be full, true and correct copies of the Summons and Complaint; Petition for Removal to the United States District Court; Bond on Removal, and Order of Removal, in that certain cause entitled William Black, Plaintiff, versus Central National Fire Insurance Company of Chicago, Illinois, Defendant.

That I have compared the same with the originals

and they are correct copies therefrom and of the whole thereof as the same remain on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Superior Court, this 24th day of February, 1913.

[Seal] E. A. SEABORG,

County Clerk and Clerk of the Superior Court of the State of Washington in and for the County of Pacific.

[Endorsed]: Filed U. S. District Court, Western District of Washington. Feb. 26, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [25]

Amended Answer.

Comes now the defendant in the above-entitled action and for amended answer to the plaintiff's complaint herein admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph II of plaintiff's complaint, and therefore denies the allegations contained in said paragraph.

III.

Defendant admits that on the 18th day of June, 1912, at Long Beach, Washington, there was executed and delivered by defendant's duly authorized agent

its policy of insurance in writing, to said plaintiff, a copy of which is attached to plaintiff's complaint and marked Exhibit "A."

IV.

Answering paragraph IV of plaintiff's complaint, defendant admits that on the 27th of June, 1912, said two-story frame building mentioned in plaintiff's complaint was totally destroyed by fire, but denies any knowledge or information sufficient to form a belief as to whether the stock of merchandise and goods, wares and merchandise kept for sale by plaintiff were totally destroyed by fire, and therefore denies the same.

V.

Answering paragraph V of plaintiff's complaint, defendant denies each and every allegation contained in said paragraph. Defendant further alleges that plaintiff did not lose [26] the sum of $5,000.00 by said fire, or any other sum in excess of $1,000.00.

VI.

Defendant denies each and every allegation contanied in paragraph VI of plaintiff's complaint, except that defendant admits on the 23d day of August, 1912, plaintiff furnished defendant with an alleged proof of loss.

VII.

Answering paragraph VII of plaintiff's complaint, defendant admits that it has not paid plaintiff for any alleged loss for the fire mentioned in plaintiff's complaint.

As a further and separate answer to plaintiff's complaint defendant alleges:

I.

That it was agreed by and between the plaintiff and defendant in said policy of insurance mentioned in plaintiff's complaint, as one of the stipulations and conditions of said policy, and provided in said policy, that if fire occur the insured shall within sixty days after the fire, unless such time is extended in writing by this company, render a statement to this company, signed and sworn to by said insured, stating amongst other things the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss thereon; that the insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examination under oath by any person named by this company and subscribe the same, and as often as required shall produce for examination all books of account, bills, invoices and other vouchers, or certified [27] copies thereof, if the originals be lost, at such reasonable place as may be designated by this company, or its representative, and shall permit extracts or copies thereof to be made.

II.

That on or about the 10th day of September, 1912, and the 9th day of October, 1912, defendant requested and demanded from plaintiff that he produce to this defendant for examination all bills of purchases of stock since his last inventory, or if said bills of purchases had been destroyed then certified copies of the original bills. Defendant also demanded from the

plaintiff that he supply and produce to defendant a record of his sales made of stock since the date of his last inventory. This defendant also requested plaintiff on or about said dates to exhibit to this defendant his last authentic inventory taken of his stock, or a certified copy thereof. That plaintiff refused to produce for the examination of this defendant any bills, invoices, or other vouchers of any goods, or certified copies thereof, or any inventory thereof. That all of this defendant's requests and requirements for bills, invoices, vouchers, statements or inventory, or certified copies thereof as above set forth, were refused and denied by plaintiff.

III.

That on the 11th day of October, 1912, plaintiff notified defendant that he would not assist the defendant any further in investigating his said alleged fire loss, and plaintiff then and there stated that as far as he was concerned the matter was then and there ended, and that he would not further perform any of the requirements, agreements, conditions or covenants on his part to be performed under the terms of the policy set forth in plaintiff's complaint. **[28]**

As a further and separate answer this defendant alleges:

I.

That on or about the 23d day of August, 1912, plaintiff furnished and delivered to the defendant an alleged proof of loss in writing, which said alleged proof was subscribed and sworn to by plaintiff before a notary public in and for the State of Washington, residing at Long Beach, Washington.

II.

Plaintiff further alleges that in said alleged proof of loss plaintiff falsely and fraudulently represented to this defendant and set forth that the said plaintiff had on hand in his saloon at the time of said fire, wines, liquors, mineral water and cigars, of the value of $7,378.85, which said property plaintiff claimed was covered and insured by said policy. Attached to and forming a part of said alleged proof of loss was a written statement setting forth the value of the items which plaintiff claimed were destroyed by said fire, and for which plaintiff claimed the defendant was liable under the terms of said policy. That among the items claimed by plaintiff was an item of five barrels of Old Crow Whiskey, which plaintiff falsely and fraudulently claimed to be of the value of $1,000.00. Defendant further alleges that plaintiff did not have on hand the said five barrels of Old Crow Whiskey at the time of said fire, and that five barrels of Old Crow Whiskey would not be of any greater value than the sum of $600.00, all of which the plaintiff well knew. Defendant further alleges that among the items claimed by plaintiff in said alleged proof of loss was an item of four barrels of Cedar Brook McBrayer's Whiskey, which plaintiff claimed were of the value of $800.00. Defendant further alleges that plaintiff did not have on hand at the time of said fire four barrels of **[29]** Cedar Brook McBrayer's Whiskey, and that four barrels of Cedar Brook McBrayer's whiskey at the time of the fire would not have been of any greater value than

$300.00, all of which the plaintiff well knew.

Defendant further alleges that among the items claimed by plaintiff in said alleged proof of loss was an item of three barrels of Green River Whiskey, which plaintiff claimed were of the value of $750.00; that plaintiff did not have said property on hand at the time of said fire, that said property was not destroyed by said fire, and that three barrels of Green River Whiskey at the time of said fire would not be of any greater value than $400.00.

That plaintiff's alleged proof of loss contained among other items the following:

3	Barrels Penwick Rye (1904)	$400.00
3	" " " (2 not tapped)	400.00
1	Barrel Old Crow Whiskey (*s* gal. drawn)	350.00
1	Barrel Fox Mountain Whiskey	400.00
2	Barrels A. G. McBrayer's Whiskey	300.00
1	Barrel Wictlow Whiskey	125.00
1	" California Port Wine	75.00
1½	" Hudson Bay Rum	50.00
2	" Clark Bros. Whiskey	214.35
1000	Attencion Cigars	35.00
900	Y. & B. Cigars	81.00
500	Van Dyke Cigars	45.00
1600	Optimo Cigars	144.00
100	Carabano Cigars	9.00
500	Alhambra Cigars	17.50
500	Gato Cigars	40.00
1½	Barrel Imported Port Wine	75.00
1½	" California Brandy	40.00

Defendant further alleges that the plaintiff did

not have the above-mentioned items of merchandise among his stock of goods on hand at the time of the fire; that the above items of merchandise were not destroyed by said fire, and that plaintiff falsely and fraudulently represented to this defendant, for the purpose of defrauding this defendant, that said items of merchandise [30] were among the stock of goods destroyed by said fire and were on hand for the plaintiff.

IV.

Defendant further alleges that plaintiff well knew at the time he delivered to this defendant his alleged proof of loss that the above items of merchandise were not of the value claimed by him, even if they had been on hand and among plaintiff's stock and destroyed by said fire. Defendant further alleges that plaintiff falsely and fraudulently claimed and represented to this defendant that the above items of goods were of values as above mentioned, whereas said items of goods were of great deal less value than the amounts claimed thereon, all of which was well known to the plaintiff. That plaintiff falsely and fraudulently represented to this defendant in said alleged proof of loss that his stock of goods destroyed by said fire was of the reasonable value of $7,378.85, whereas said stock of goods was not of said value and was not at the time of its destruction by fire of any greater value than $1,000.00. That plaintiff claimed in said alleged proof of loss payment for various other items of liquors which were not on hand or among his stock of goods destroyed, for the purpose of defrauding this defendant. De-

fendant further alleges that said alleged proof of loss contained items of merchandise not covered by said policy and not within the terms thereof, all of which plaintiff well knew, and that plaintiff made claim for the above mentioned items of goods from this defendant for the purpose of defrauding this defendant, and plaintiff falsely and fraudulently represented to this defendant that they were among the stock of goods destroyed by said fire.

V.

That the said policy of insurance described in plaintiff's complaint, provides, among other things, that in case of [31] any fraudulent or false swearing by the insured relating to his insurance or the subject thereof, whether before or after loss it shall render said policy void; that by reason of plaintiff's false swearing as aforesaid, and of plaintiff's attempt to defraud this defendant, said insurance policy is void and of no effect.

As a further and separate answer defendant alleges:

I.

That on or about the 18th day of June, 1912, this defendant executed and delivered to the plaintiff a certain policy of insurance, described in plaintiff's complaint.

II.

That on or about the 27th day of June, 1912, the building described in said policy was destroyed by fire, together with whatever stock of liquors, wines and cigars, plaintiff had on hand in said building at the time of said fire, which said fire was caused by

the act, design or procurement of the plaintiff, and not otherwise; that by reason thereof said policy is void and of no effect and this defendant is not liable thereunder.

III.

That this defendant has heretofore tendered to the plaintiff and now brings and tenders into court for the use and benefit of the plaintiff the insurance premium, amounting to $137.50 received by this defendant from the plaintiff under said policy.

WHEREFORE, defendant demands that plaintiff take nothing by this action, that the same be dismissed and that defendant have and recover of and from the plaintiff herein [32] its costs and disbursements incurred in this action.

COLE & COLE and
W. F. MAGILL,
Attorneys for Defendant.

[Verified.]

[Endorsed]: "Filed in the U. S. District Court, Western District of Washington, Southern Division. Aug. 29, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [33]

Reply to Amended Answer.

Now comes the plaintiff in the above-entitled action and for reply to the affirmative defenses set up in the amended answer of the defendants, says:

I.

Replying to the second paragraph of the first affirmative defense as contained in said answer, the

plaintiff alleges and avers the fact to be that he gave to said defendant, its agent and servants, all information in his possession concerning the amount of loss sustained by him under the policy sued on; that all of the invoices and the inventory of the stock of goods so contained in the building described in said policy of insurance were destroyed by fire, and it was impossible for plaintiff to produce the originals of the invoices and inventory, but said plaintiff did furnish to said defendant, its agent and servants, the names and addresses of all persons, firms and corporations with whom plaintiff had bought goods, so as to enable the said defendant, its agents and attorneys, to ascertain for themselves the extent of plaintiff's loss under said policy. The plaintiff denies that the request of defendant for bills, invoices, vouchers, statements or inventory or certified copies thereof were refused and denied by this plaintiff, but, on the contrary, the plaintiff alleges and avers the fact to be that he did everything within his power to comply with the terms and stipulations contained in said policy of insurance and with the demands and requests made by said defendant, its officers, agents and servants, for information concerning the extent of the plaintiff's said loss.

II.

For reply to the third paragraph of the first affirmative [34] defense, as contained in said answer, the plaintiff denies the same, the whole and every part thereof, and each and every allegation therein contained.

For reply to the second affirmative defense, as con-

tained in said answer, the plaintiff says:

I.

For reply to the second paragraph thereof, he admits that the proof of loss which he furnished to said defendant disclosed that at the time of the fire plaintiff had on hand wines, liquors, mineral water, cigars and other articles of personal property of the value of SEVENTY-THREE HUNDRED SEVENTY-EIGHT and 85/100 ($7378.85) DOLLARS; admits that among the items of personal property plaintiff claims was destroyed was five (5) barrels of "Old Crow" whiskey, which plaintiff claimed and verily believes was of the value of the sum of ONE THOUSAND ($1,000) DOLLARS, which whiskey the plaintiff avers and alleges that he had on hand at the time of said fire and which was destroyed therein; plaintiff admits that said proof of loss set forth the items of personal property mentioned and described in paragraph two (2) of the second affirmative defense, as contained in said answer, all of which were on hand at the time of said fire and which plaintiff, at the time of making proof of loss, verily believed to be of the value represented by him in his proof of loss so made to the defendant company.

II.

Replying to the third paragraph of said second affirmative defense, plaintiff denies the same, the whole and every part thereof and each and every allegation therein contained. **[35]**

III.

For reply to the matters and things contained in paragraph four (4) of the second affirmative defense

as contained in the amended answer, plaintiff denies that he made any false representations whatsoever concerning the value of the goods so destroyed by fire which plaintiff claims were covered by said policy of insurance, and denies that he made any false or fraudulent statements as to the items of goods of personal property so destroyed by fire, and he denies that in his proof of loss he falsely and fraudulently or at all made any false representations to the said defendant concerning the stock of goods so destroyed by fire; plaintiff denies that said stock of goods was not of any greater value than ONE THOUSAND ($1,000) DOLLARS at the time of its destruction by fire, and alleges the fact to be that it was of the approximate value of SEVENTY-THREE HUNDRED SEVENTY-EIGHT and 85/100 ($7378.85) DOLLARS. Plaintiff further alleges and avers the fact to be that the proof of loss so made out and sent to the defendant insurance company was wholly written, made out and constructed by HENRY KAYLER, the agent of said defendant, at Long Beach, in the State of Washington, and that if said proof of loss contained any items of merchandise or personal property not covered by said insurance, the same was not due to any fault or design on the part of the said plaintiff to in any manner defraud or deceive the said defendant company, but that said plaintiff wholly relied upon the said HENRY KAYLER, the agent of the said defendant insurance company, to properly make out said proof of loss and to include therein such items of personal property only as was covered by said policy of insurance, and plain-

tiff avers and alleges the fact to be on information and belief that if the said Kayler, the [36] agent of said defendant, did include in said proof of loss any items of personal property not covered by said policy of insurance, that the said was done without any design on the part of the said Kayler to defraud said insurance company, and plaintiff further avers and alleges the fact to be that in the making out of said proof of loss the said Kayler was acting for and on behalf of the defendant insurance company and not for and on behalf of this plaintiff.

IV.

For reply to the fifth paragraph of the second affirmative defense as contained in said amended answer, plaintiff admits that the policy of insurance upon which this action is brought provides among other things in case of any fraudulent or false swearing by the insured in the respects set out in said paragraph, that the policy becomes void, but plaintiff avers and alleges the fact to be that he has never been guilty of any false swearing or of any attempt to defraud the said defendant.

For reply to the third affirmative defense as contained in said answer, the plaintiff says:

I.

For reply to the second paragraph of said third affirmative defense, the plaintiff denies the same, the whole and every part thereof and each and every allegation therein contained.

II.

For reply to the third paragraph of the third affirmative defense, as contained in said answer, the

plaintiff denies the same, the whole and every part thereof, and each and every allegation therein contained; denies that the defendant at any time tendered to the plaintiff said sum of ONE HUNDRED THIRTY-SEVEN [37] and 50/100 ($137.50) DOLLARS.

And now having fully replied to said answer of defendant, plaintiff prays for judgment as set forth in his complaint.

J. J. BRUMBACH and
HAYDEN, LANGHORNE & METZGER,
Attorneys for Plaintiff,
617 Tacoma Bldg., Tacoma, Washington.

[Verified.]

[Endorsed]: "Filed in the U. S. District Court, Western District of Washington, Southern Division. Sep. 17, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [38]

Interrogatories.

The following interrogatories are hereby propounded to the plaintiff by defendant pursuant to Section 1226 of Remington and Ballinger's Annotated Codes and Statutes, which said interrogatories are filed for the discovery of facts material and necessary for the defendant to defend the above-entitled action:

Int. 1. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of five barrels of Old Crow Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm

or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 2. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of four barrels of Cedar Brook McBrayer's Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 3. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of three barrels of Green River Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 4. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of three barrels of Penwick Rye, and if so state where you purchased said Penwick Rye and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 5. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of one barrel of Old Crow Whiskey (1899), and if so state where you purchased said whiskey and the name and address of the person,

firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 6. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of one barrel of Fox Mountain Whiskey (1896), and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 7. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of one barrel of A. G. McBrayer's Whiskey and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor. **[39]**

Int. 8. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of one barrel of Wictlow Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 9. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of one barrel of California port wine, and if so state where you purchased said wine and the name and address of the person, firm

or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 10. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of one-half barrel Imported Port Wine, and if so state where you purchased said wine and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 11. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of a barrel and a half of California brandy, and if so state where you purchased said brandy and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 12. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of a barrel and a half of Hudson Bay Rum, and if so state where you purchased said rum and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 13. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two barrels of Clark Bros. Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the

same, the date of the purchase and the amount paid therefor.

Int. 14. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item 1600 Optimo Cigars, and if so state where you purchased said cigars and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 15. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of 500 Van Dyke Cigars, and if so state where you purchased said cigars and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 16. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based [40] consists of an item of 800 Manila Cigars, and if so state where you purchased said cigars and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 17. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of 800 El Rayo Cigars, and if so state where you purchased said cigars and the name and address of the person, firm or corporation from whom you purchased the same, and date of the purchase and the amount paid therefor.

Int. 18. State whether or not part of plaintiff's

claim for loss upon which the above-entitled action is based consists of an item of 900 Y. & B. Cigars, and if so state where you purchased said cigars and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase, and the amount paid therefor.

Int. 19. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of five barrels of bottled beer, and if so state where you purchased said beer and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 20. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of five cases of Joe Gideon's Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase, and the amount paid therefor.

Int. 21. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of twenty-two cases of Rocksberry Rye, and if so state where you purchased the same and the name and address of the person, firm or corporation from whom you purchased said rye, the date of the purchase and the amount paid therefor.

Int. 22. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of four cases of Old Crow

Bourbon Whiskey, and if so state where you purchased the same and the name and address of the person, firm or corporation from whom you purchased said whiskey, the date of the purchase and the amount paid therefor.

Int. 23. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of four cases of Guggenheimer Whiskey, and if so state where you purchased said whiskey, and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 24. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based **[41]** consists of an item of four cases of Hermitage Whiskey, and if so state where you purchased said whiskey, and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 25. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of four cases of Gibson Rye, and if so state where you purchased said rye and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 26. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of three cases of Atherton Whiskey, and if so state where you purchased said

whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 27. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two cases of Pebbleford Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 28. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two cases of McBrayer's Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

29. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of four cases of W. H. Lacey's Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

30. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two cases of Yellowstone Whiskey, and if so state where you purchased said

whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

31. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two Gordon Whiskey, and if so state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

32. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of 15 cases of Jel Razier Whiskey, and if so [42] state where you purchased said whiskey and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 33. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two cases of Pine Apple Rock Rye, and if so state where you purchased the same and the name and address of the person, firm or corporation from whom you purchased it, the date of the purchase and the amount paid therefor.

Int. 34. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two cases of Claret wine, and if so state where you purchased the said wine and the name and address of the person, firm or corporation from whom you purchased the same, the

date of the purchase and the amount paid therefor.

Int. 35. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of one case Benedictine (Imported), and if so state where you purchased the same and the name and address of the person, firm or corporation from whom you purchased it, the date of the purchase and the amount paid therefor.

Int. 36. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two cases of Muscat wine, and if so state where you purchased the said wine and the name and address of the person, firm or corporation from whom you purchased it, the date of the purchase and the amount paid therefor.

Int. 37. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two cases of Angelica wine, and if so state where you purchased said wine, and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 38. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of four cases of Cresta Blanca Wine, and if so state where you purchased said wine, and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 39. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is

based consists of an item of two cases of Sparkling Burgundy (Pints), and if so state where you purchased said wine and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor.

Int. 40. State whether or not part of plaintiff's claim for loss upon which the above-entitled action is based consists of an item of two cases Sparkling Burgundy (quarts), and if so state where you purchased said wine and the name and address of the person, firm or corporation from whom you purchased the same, the date of the purchase and the amount paid therefor. **[43]**

41. State the name of the person, firm or corporation from whom you purchased all other goods upon which the above-entitled action is based and for which a claim of loss is made not heretofore covered by these interrogatories, and the date upon which the same was purchased, together with the purchase price thereof.

42. State the names and addresses of all persons, firms or corporations from whom you purchased goods for your saloon at Long Beach, Washington.

COLE & COLE and
W. F. MAGILL,
Attorneys for Defendant.

[Verified.]

[Endorsed]: "Filed in the U. S. District Court, Western District of Washington. May 13, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." **[44]**

Plaintiff's Answer to Interrogatories Propounded by Defendant.

State of Washington,
County of Pacific,—ss.

William Black, being sworn, on oath deposes and states that he is the above-named plaintiff, in the above-entitled cause of action, now pending in the above-named court; that in answer to the interrogatories propounded to him, and filed in said cause, he respectfully submits the following, to wit:

1. Answering interrogatory 1 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consisting of five barrels of Old Crow Whiskey, that he purchased the same from Blumaur & Hock, of Portland, whose postoffice address is Portland, Oregon; that as to the date of said purchase, and the amount paid, plaintiff has not sufficient data or memory to state, for the reason that his books and copies of inventories were destroyed and lost by having burned in the building where said stock was kept.

2. Answering interrogatory 2 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consists of four barrels of Cedar Brook McBrayer's Whiskey; that he purchased the same from Julius Kesler, of   , whose postoffice address is   ; that as to the date of said purchase, and the amount paid therefor, plaintiff has not sufficient data and memory to state, for the reasons stated in answer to paragraph or interrogatory 1 herein.

3. Answering interrogatory 3 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consists of three barrels of Green River Whiskey, that [45] he purchased the same from Blumaur & Hoch, of Portland, Oregon, whose postoffice address is Portland, Ore.; that as to the date of said purchase, and the amount paid, plaintiff has not sufficient data and memory to state, for the reasons stated in answer to interrogatory herein.

4. Answering interrogatory 4 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consists of three barrels of Penwick Rye Whiskey; that he purchased the same from Blumaur & Hock, Portland, Oregon, whose postoffice address is Portland, Ore.; that as to the date of said purchase, and the amount paid therefor plaintiff has not sufficient data and memory to herein state, for the reasons stated in answer to interrogatory 1 herein.

5. Answering interrogatory 5 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consists of one barrel of Old Crow Whiskey (1899); that the same was purchased from Chevalier & Company, of San Francisco, California, whose postoffice address is San Francisco, California; that as to the date of said purchase and the amount paid therefor, plaintiff has no sufficient data and memory to state, for the reasons stated *so* interrogatory 1 herein.

6. Answering interrogatory 6 thereof, he states that part of plaintiff's claim, upon which the above-

entitled action is based, consists of the item of one barrel of Fox Mountain Whiskey (1896); that the same was purchased from Brown Foreman Company, of Louisville, Ky., whose postoffice address is Louisville, Ky.; that as to the date of said purchase and the amount paid therefor, plaintiff has not sufficient data to state for the reasons stated in interrogatory 1 herein.

7. Answering interrogatory 7 thereof, he states, **[46]** that part of plaintiff's claim, upon which this action is based, consists of the items of two barrels of A. G. McBrayer's Whiskey; that the same was purchased from Greenbaum Bros., of Louisville, Ky., whose postoffice address is Louisville, Ky.; that as to the date of said purchase and the amount paid therefor plaintiff has not sufficient data or memory to state, for the reasons stated to interrogatory 1 herein.

8. Answering interrogatory 8 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consists of the item of one barrel of Wictlow Whiskey; that the same was purchased from Greenbaum Bros., of Louisville, Ky., with postoffice address, Louisville, Ky.; that as to the date of said purchase and the amount paid therefor, plaintiff has not sufficient data or memory to state, for the reasons stated to interrogatory 1 herein.

9. Answering interrogatory 9 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consists of one barrel of California port wine; that he has no data of whom

the same was purchased, or the price paid therefor, for the reasons stated to interrogatory 1 herein.

10. Answering interrogatory 10 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consists of the item of one-half barrel of Imported Port wine; that the same was purchased from De Fremery & Company, of San Francisco, Cal., whose postoffice address is San Francisco, Cal.; that as to the date of said purchase and the amount paid therefor, plaintiff has not sufficient data or remembrance to state for the reasons stated to interrogatory 1 herein.

11. Answering interrogatory 11 thereof, he states that part of plaintiff's claim, upon which the above-entitled action [47] is based, consists of the item of one-half barrel of California Brandy; that he has no data of whom the same was purchased or the price paid therefor, for reasons stated to interrogatory 1 herein.

12. Answering interrogatory 12 thereof, he states that part of plaintiff's claim upon which the above action is based, consists of the item of one-half barrel of Rum (Hudson Bay); that the same was purchased from Fleckenstein & Company, of Portland, Ore., whose postoffice address is Portland, Ore.; that as to the date of said purchase and the amount paid therefor, plaintiff has not sufficient data or remembrance to state, for the reasons stated to interrogatory 1 herein.

13. Answering interrogatory 13 thereof, he states that part of plaintiff's claim, upon which the above-

entitled action is based, consists of the items of two barrels of Clark Bros. Whiskey; that the same was purchased from said company's Distillery, Peoria, Illinois, postoffice address, Peoria, Ill.; that as to the date of said purchase, and the amount paid therefor, plaintiff has no sufficient data or remembrance to state, for reasons stated to interrogatory 1 herein.

14. Answering interrogatory 14 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consists of 1600 Optimo Cigars; that the same was purchased from Hart Cigar Company, of Portland, Ore., and others whose postoffice address, as to said Hart Cigar Company, is Portland, Ore., otherwise unknown; that as to the date of said purchase, and the amount paid therefor, plaintiff has no sufficient data or remembrance to state, for reasons stated to interrogatory 1 herein.

15. Answering interrogatory 15 thereof, he states [48] that part of plaintiff's claim, upon which the above-entitled action is based, consists of the item of 500 Van Dyke Cigars; that the same was purchased from M. A. Gunst & Co., of Portland, Ore., and others; that the postoffice address of said Gunst & Co. is Portland, Ore., otherwise unknown; that as to the date of said purchase and the amount paid therefor, plaintiff has no sufficient data or remembrance to state, for the reasons stated to interrogatory 1 herein.

16. Answering interrogatory 16 thereof, he states that part of plaintiff's claim, upon which the

above-entitled action is based, consists of the item of 800 Manila Cigars; that the same was purchased from Hart Cigar Company, of Portland, Ore., and Woolley & Co., of Seattle, Wash., whose address is said Portland, Ore., and Seattle, Wash.; that as to the date of purchase and the amount paid therefor, plaintiff has no sufficient data or remembrance to state for the reasons stated in interrogatory 1 herein.

17. Answering interrogatory 17 thereof, he states that part of plaintiff's claim, upon which the above-entitled action is based, consists of the item of 800 El Rayo cigars; that the same was purchased from Campbell & Evans, of Portland, Ore., whose postoffice address is Portland, Ore., that as to the date of said purchase and the amount paid therefor, plaintiff has no sufficient data or remembrance to state, for the reasons stated in interrogatory 1 herein.

18. Answering interrogatory 18 thereof, he states that part of plaintiff's claim, upon which the *above-entitled is* based, consists of the item of 900 Y. & B. cigars; that the same was purchased from Mason & Erwin Co., of Portland, Ore., whose postoffice address is Portland, Ore.; that as to the date of said purchase and the amount paid therefor, plaintiff has no sufficient data [49] or remembrance to state, for the reasons stated in interrogatory 1 herein.

19. Answering interrogatory 19 thereof, he states that a part of plaintiff's claim, upon which the above-entitled action is based, consists of the

item of five barrels of bottled beer; that the same was purchased from Wienhardt's Brewery of Portland, Ore., and the North Pacific Brewery, of Astoria, Ore.; whose postoffice addresses are Portland, Ore., and Astoria, Ore., that as to the date of said purchase and the amount paid therefor, plaintiff has no sufficient data or remembrance to state, for the reasons stated in interrogatory 1 herein.

20. Answering interrogatory 20 thereof, he states that a part of plaintiff's claim upon which the above-entitled action is based, consists of the item of five cases of Joe Gideon Whiskey; that the same was purchased from Greenbaum Bros., of Louisville, Ky., whose postoffice address is Louisville, Ky.; that as to the date of said purchase and the amount paid therefor, plaintiff has no sufficient data or remembrance to state, for the reasons stated in answer to interrogatory 1 herein.

21. Answering interrogatory 21 thereof, he states that a part of plaintiff's claim upon which the above-entitled action is based, consists of the items of twenty-two cases of Roxbury Rye Whiskey; that the same was purchased from Bluthanthal & Beckart, of Baltimore, Md., whose postoffice address is Baltimore, Md.; that as to the date of said purchase and the amount paid therefor, plaintiff has not sufficient data or remembrance to state, for the reasons stated in answer to interrogatory 1 herein.

22. Answering interrogatory 22 thereof, he states that a part of plaintiff's claim upon which the above-entitled action is based, consists of the item of four cases of Old Crow **[50]** Bourbon Whis-

key; that the same was purchased from Blumaur, Hock, of Portland, Ore., whose postoffice address is Portland, Ore.; that as to the date of said purchase and the amount paid therefor, plaintiff has not sufficient data or remembrance to state, for the reasons stated in answer to interrogatory 1 herein.

23. Answering interrogatory 23 thereof, he states that a part of plaintiff's claim upon which the above-entitled action is based consists of the item of four cases of Guggenheimer Whiskey; that the same was purchased from Rothchild Bros., of Portland, Ore., whose postoffice is Portland, Ore.; that as to the date of said purchase and the amount paid therefor plaintiff has not sufficient data or remembrance to state, for the reasons stated in answer to interrogatory 1 herein.

24. Answering interrogatory 24 thereof, he states that a part of the plaintiff's claim upon which the above-entitled action is based, consists of the item of four cases of Hermitage Whiskey; that the same was purchased from Rothchild Bros., of Portland, Ore., whose postoffice address is Portland, Ore.; that as to the date of said purchase and the amount paid therefor plaintiff has not sufficient data or remembrance to state, for the reasons stated in answer to interrogatory 1 herein.

25. Answering interrogatory 25 thereof, he states that a part of plaintiff's claim upon which the above-entitled action is based consists of the item of four cases of Gibson Rye Whiskey; that the same was purchased from James De Fremery, of San Francisco, Cal., whose postoffice address is San Fran-

cisco, Cal.; that as to the date of said purchase and the amount paid therefor, plaintiff has not sufficient data or remembrance to state, for the reasons stated in answer to interrogatory 1 herein. [51]

26. Answering interrogatory 26 thereof, he states that a part of the plaintiff's claim, upon which the above-entitled action is based, consists of the item of three cases of Atherton Whiskey; that the same was purchased at sheriff's sale at Long Beach, Wash., during the latter part of 1911, with other stock of A. B. Nye & Co.; that plaintiff has no data or remembrance of the amount paid therefor, for reasons stated in answer to interrogatory 1 herein.

27. Answering interrogatory 27 thereof, he states that a part of plaintiff's claim, upon which the above-entitled action is based, consists of the item of two cases of Pebbleford Whiskey; that the same was purchased from John Eckland, of Portland, Ore., whose postoffice address is Portland, Ore.; that as to the date of said purchase and the amount paid therefor, plaintiff has no sufficient data or remembrance to state, for the reasons stated in answer to interrogatory 1 herein.

28. Answering interrogatory 28 thereof, he states that a part of the plaintiff's claim upon which the above-entitled action is based consists of two cases of McBrayer's Whiskey; that the same was purchased during the latter part of 1911 at sheriff's sale with the other stock of A. B. Nye & Co.; that plaintiff has no data or remembrance of the amount paid therefor, for reasons stated in answer to interrogatory 1 herein.

29. Answering interrogatory 29 thereof, he states that a part of the plaintiff's claim upon which the above-entitled action is based consists of four cases of W. H. Lacey's Whiskey; that the same was purchased from W. J. Van Schuyver & Company, of Portland, Ore., whose postoffice address is Portland, Ore.; that as to the date of said purchase and the amount paid therefor, plaintiff has no data or remembrance sufficient to state, for **[52]** reasons stated in answer to interrogatory 1 herein.

30. Answering interrogatory 30 thereof, he states that a part of the plaintiff's claim upon which the above-entitled action is based, consists of the *item two* cases of Yellowstone Whiskey; that the same was purchased from Rothchild Bros., of Portland, Ore., whose postoffice address is Portland, Ore.; that as to the date the same was purchased and the amount paid therefor, plaintiff has no data or remembrance sufficient to state, for reasons stated in answer to interrogatory 1 herein.

31. Answering interrogatory 31 thereof, he states that a part of the plaintiff's claim, upon which the above-entitled action is based, consists of the item of two cases of Gordon Gin; that plaintiff has no data or remembrance of whom it was purchased or the amount paid therefor, for the reasons heretofore stated in answer to interrogatory 1 herein.

32. Answering interrogatory 32 thereof, he states that a part of the plaintiff's claim, upon which the above-entitled action is based, consists of the item of fifteen cases of Joel B. Frazier's Whiskey; that the same was purchased from James De

Fremery & Co. of San Francisco, Cal.; that as to the date of said purchase and the amount paid therefor, plaintiff has no data or remembrance sufficient to state, for the reasons stated in his answer to interrogatory 1 herein.

33. Answering interrogatory 33 thereof, he states that a part of the plaintiff's claim, upon which the above action is based, consists of the item of two cases of Pine Apple Rock Rye; that the same was purchased from J. J. Haggerty & Co., formerly of Seattle, Wash.; said J. J. Haggerty's postoffice address is Raymond, Wash.; that as to the date of said purchase and the amount paid therefor plaintiff has no data or remembrance **[53]** sufficient to state, for the reasons heretofore stated in his answer to interrogatory 1 herein.

34. Answering interrogatory 34 thereof, he states that a part of plaintiff's claim upon which the above action is based consists of the item of two cases of Claret wine; that the same was purchased from Bontherford, of Portland, Ore.; that as to the date of said purchase and the amount paid therefor plaintiff has no data or remembrance sufficient to state, for the reasons stated in his answer to interrogatory 1 herein.

35. Answering interrogatory 35 thereof, he states that a part of plaintiff's claim upon which the above-entitled action is based, consists of an item of one case of Benedictine (Imported), which was purchased with the saloon and stock, in Ilwaco, Wash.; that he has no data or knowledge of the parties from whom it was purchased, or the amount paid there-

for, and is therefore unable to answer the same.

36. Answering interrogatory 36 thereof, he states that a part of plaintiff's claim, upon which the above-entitled action is based, consists of two cases of Muscat wine; that the same was purchased from Jas. De Fremery, of San Francisco, Cal., and whose postoffice address is San Francisco, Cal.; that as to the date of said purchase and the amount paid therefor plaintiff has no data or remembrance sufficient to state for the reasons stated in his answer to interrogatory 1 herein.

37. Answering interrogatory 37 he states that a part of plaintiff's claim, upon which the above-entitled action is based, consists of two cases of Angelica wine; that the same was purchased from Jas. De Fremery, as stated in answer to interrogatory 36 above; that as to the date of the purchase and [54] the amount paid therefor, plaintiff has no data or remembrance sufficient to state for the reasons stated in his answer to interrogatory 1 herein.

38. Answering interrogatory 38 thereof, he states that a part of plaintiff's claim, upon which the above-entitled action is based, consists of four (4) cases of Cresta Blanca wine; that the same was purchased either from Brown, Foreman, of San Francisco, Cal., or from Blumaur & Hock of Portland, Ore., whose postoffice addresses are respectively at said places; that as to the date of purchase and the amount paid therefor, plaintiff has no data or remembrance sufficient to state for the reasons stated in his answer to interrogatory 1 herein.

39. Answering interrogatory 39 thereof, he states that a part of plaintiff's claim, upon which the above-entitled action is based, consists of two cases of Sparkling Burgundy (pints); that the same was purchased from the same firms named in answer to interrogatory 38 herein; that as to the date of purchase and the amount paid therefor, plaintiff has no data or remembrance sufficient to state, for the reasons stated in his answer to interrogatory 1 herein.

40. Answering interrogatory 40 thereof, he states that a part of plaintiff's claim, upon which the above-entitled action is based, *consists the* item of two cases of Sparkling Burgundy (quarts); that the same was purchased from the firms named in his answer herein to interrogatory 38 hereinbefore; that as to the date of purchase or the amount paid therefor plaintiff has no data or remembrance thereof sufficient to state, for the reasons stated to his answer to interrogatory 1 herein.

41. Answering interrogatory 41 thereof, he states to the best of his recollection and memory that the names of [55] other persons, firms or corporations, from whom he has purchased all other goods, upon which the above-entitled action is based, and for which a claim of loss is made are as follows, to wit: Old Kentucky Distillery Company, of Louisville, Kentucky; Sherwood & Company, Importers, of San Francisco, California; Henry Flecenstein Company, of Portland, Oregon; F. Zimmerman & Company, of Portland, Oregon; Bonney Bros., Distillers, of Louisville, Kentucky; Sunny Brook Dis-

tilling Co., and numerous other parties, who have not heretofore been mentioned in the interrogatories herein; that the dates of said purchases and the amounts paid therefor plaintiff has no data or remembrance sufficient to base a statement thereof, for the reasons stated in his answer to interrogatory 1 herein.

42. Answering interrogatory 42 thereof, he states, that he has no book account or invoices, original or copies thereof, of the goods he purchased for his saloon at Long Beach, Wash., because the same were destroyed when his saloon building was burned with all its contents; that he has to *reply* upon casual memory, and that he has hereinbefore given the names of the persons, firms, and corporations that he has dealt with and purchased goods from, from his best present recollection, and that therefore he refers to the said names and *post* addresses hereinbefore stated as his answer to said interrogatory 42 herein.

WILLIAM BLACK.

Subscribed and sworn to before me this 2d day of June, 1913.

[Seal] J. J. BRUMBACH,

Notary Public for the State of Washington, Residing at Ilwaco, in Said State. **[56]**

[Endorsed]: "Filed in the U. S. District Court, Western District of Washington, Southern Division, Sep. 16, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[57]**

Stipulation [as to Tender of Insurance Premium].

It is hereby stipulated and agreed by and between the plaintiff and defendant in the above-entitled action, by their respective attorneys, that the insurance premium of $137.50, received from William Black as premium on Policy No. 590,757, dated June 18, 1912, given to William Black by the Central National Fire Insurance Company, of Chicago, covering his stock of liquors, wines, cigars, beer, soda and mineral waters at Long Beach, Washington, being the policy upon which the above action is brought, was tendered to J. J. Brumbach, of Ilwaco, Washington, on or about the 25th day of March, 1913, and prior to the filing of defendant's answer in the above action, and was refused by him.

COLE & COLE,
Attorneys for Defendant.
J. J. BRUMBACH,
Attorney for Plaintiff.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 23, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [58]

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess his damages at the sum of Five Thousand Dollars ($5,000.00).

ROBERT DORAGH,
Foreman.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 23, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [59]

Judgment.

This cause coming on regularly to be heard before the undersigned judge of the above-entitled court on the 21st day of October, 1913, a jury of twelve men having been duly and regularly impanelled and sworn to try the issues in said cause, evidence both oral and documentary having been introduced, and said cause having been argued to the jury by counsel for both plaintiff and defendant, and the jury having been instructed by the Court, and having retired to consider of their verdict, the said jury did on the 23d day of October, 1913, return into court with a verdict in which they found for the plaintiff in the sum of FIVE THOUSAND and no /100 ($5,000.00) DOLLARS, and the Court having considered the said verdict, and being duly advised in all the premises; it is, now, therefore,

ORDERED, ADJUDGED and DECREED, that the plaintiff, William Black, do have and recover judgment of and from the defendant Central National Fire Insurance Company of Chicago, Illinois, a corporation, in the sum of FIVE THOUSAND and no/100 ($5,000.00) DOLLARS, with interest thereon at the rate of 6% per cent per annum from the 6th day of December, 1912; together with

his costs and disbursements taxed herein.

Done in open Court this 30th day of October, 1913.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 30, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [60]

Motion for New Trial.

Comes now the defendant in the above-entitled action and moves the Court for an order setting aside the judgment and verdict of the jury heretofore given and entered in the above-entitled cause, and granting a new trial for the following reasons materially affecting the substantial rights of the defendant:

(1) Excessive damages appearing to have been given under the influence of passion and prejudice;

(2) Error in the assessment of the amount of recovery, as the amount assessed was greater than the amount justified by the evidence;

(3) Insufficiency of the evidence to justify the verdict;

(4) That the verdict and judgment is against law;

(5) Errors in law occurring at the trial and excepted to at the time by defendant;

(6) Newly discovered evidence material for the defendant, which it could not, with reasonable dili-

gence, have discovered and produced at the trial.

COLE & COLE,
Attorneys for Defendant.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington. Nov. 15, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." **[61]**

Order Denying Motion for New Trial.

This cause coming on regularly to be heard upon the 24th day of November, 1913, upon the motion of the defendant for a new trial of the above-entitled action, Cole & Cole, attorneys for the defendant appearing in support of the motion, and J. J. Brumbach and Hayden, Langhorne & Metzger appearing in opposition thereto, and the Court being duly advised in all the premises, it is

ORDERED that the said motion be and the same is hereby denied, upon each and every of the several grounds, to which ruling the defendant excepted and his exception is hereby allowed.

Done in open court this 1st day of December, 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 1, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[62]**

Order [Granting Defendant to January 10, 1914, to File Proposed Bill of Exceptions].

This matter being regularly before the Court upon the defendant's motion asking for further time to serve and file its proposed bill of exceptions, the Court after hearing, and being fully advised in the premises, does hereby

ORDER that the defendant be and it hereby is granted to and including January 10th, 1914, in which to serve and file its proposed bill of exceptions.

Done in open court this 23d day of December, A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 23, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[63]**

Bill of Exceptions.

BE IT REMEMBERED, That heretofore and on the 21st day of October, 1913, this cause came on duly and regularly for hearing before Honorable E. E. CUSHMAN, a Judge of the above-entitled Court, and a jury, whereupon the following proceedings were had and done, to wit:

[Testimony of S. A. Madge, for Plaintiff.]

S. A. MADGE, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

My name is S. A. Madge. I reside at Olympia. Occupation, insurance. I have been in the insurance business for about five years. I was deputy insurance commissioner for four years. Prior to that time I was deputy collector of internal revenue. I ceased to be deputy of internal revenue about five years ago. I have been a resident of this State since 1892. During that time I was in business for myself before I went into the internal revenue service. I was acquainted with William Black. I must have been acquainted with him for ten or twelve years. I have been in his place of business at Long Beach, I think, once or twice. The last time was shortly before I went out of the service. It was about five years ago. Mr. Black formerly ran a saloon at Ilwaco. I was in his place of business there. He had two places; moved from the first place that he had into a new building. I was in both of those places at Ilwaco and I was in his place of business after he moved to Long Beach. I visited it in my official capacity as deputy collector of internal revenue.

It is the *deputy* of the deputy collector of internal revenue to visit saloons and all classes of people who hold **[64]** a special tax stamp to do business from the internal revenue department. When you go in there it is your business to see that the stock is kept in compliance with the law, and see that there is

(Testimony of S. A. Madge.)

no violation of the internal revenue law; that sometimes results in the necessity of testing goods. We have frequently to gauge the class of goods that he has.

Said witness further testified: [65]

Q. What I am getting at is what kind or character of goods did Mr. Black keep in his saloon if you know? A. Yes, sir; I do.

Mr. COLE.—We object to any testimony that this witness might give regarding the information that he derived as deputy collector of internal revenue on the ground that it is prohibited by the United States laws.

The COURT.—It is the Government's privilege and the privilege of the internal revenue officers themselves. Do you contend that it is a privilege of which you can take advantage?

Mr. COLE.—We subpoenaed Mr. Stit, a deputy revenue collector, and the internal revenue office here refused to let him testify, and it seems to me that— (interrupted).

The COURT.—Mr. Madge could claim his privilege, or he could be prevented by the Government from testifying, but that is nothing that the defense can avail itself of, as I understand, or unless you have some authorities where it has been held by the Federal courts that the testimony is not admissible on the ground of public policy and also the regulations of the treasury department. It is public policy to protect the United States Government in its source of revenue, but how you are interested is not

clear. Objection overruled. Exception allowed.

Q. Just tell the jury what kind and character of stock of liquors Mr. Black kept on hand.

A. Mr. Black—(interrupted).

Mr. COLE.—I object on the ground that it is not close enough, unless shown to be immediately preceding the fire.

The COURT.—The defendant is accused of fraud. Both the fact of the charge of fraud and the defense for the want of **[66]** fraud, depends more or less on circumstances, and this is admitted and your objection overruled on the ground that it is a circumstance from which the jury may infer either fraud or want of fraud.

Mr. COLE.—Our objection is that they can only show what stock he had immediately, or not very long prior to the fire.

The COURT.—Well, the Court does not conclude that this is so remote as to require that it be ruled out. Objection overruled Exception allowed.

A. The stock of goods that he carried in Ilwaco, I remember very distinctly. I do not remember so distinctly about the stock of goods at Long Beach after he moved up there, but my impression is that it was the same stock of goods as the saloon in Ilwaco. The stock of goods,—it was a small town, and I was impressed with the stock of goods that he carried, because it was so far beyond the class of goods that are kept in saloons in towns of that size, that I make an inquiry, I think, and some investigation, to find why he was carrying a stock which was

(Testimony of S. A. Madge.)

all double-stamped goods. Double-stamped goods are straight distillery goods. I do not think he had,—my impression is that he did not have a barrel of blend,—he might have had one or two barrels of blend but I do not believe he had a barrel of rectified goods in the place. He carried a very high grade of liquors, Old Crow, Hermitage, Penwick Rye, and that class of goods. His bottled goods were, too. All bottled in bond, and he had quite a bit of re-imported goods. Re-imported goods is the finest goods that is carried, and he had goods, so **[67]** my recollection of the tests of them is, that they ran up,—I think he had one barrel that ran up to 120 proof, a very high grade of goods, and he had quite a stock of it; it was in barrels and the barrels were racked up, and the barrels were all tapped, and I tested quite a bit of it, because I felt it was my duty to do so, on account of the size of the town, but he gave me a very reasonable explanation of why he carried that class of goods in his place.

Q. Tell the jury.

A. I asked him how he came to carry a line of goods that were of that class, and he stated to me that when he first went into business there he discovered that all of the people coming down from Portland,—at that time the boats landed at the dock at Ilwaco, and the people going up to Long Beach on Fridays and Saturdays would bring along demijohns down with them, and he concluded—(interrupted).

Q. Right there, I want to ask you if Long Beach is a summer resort?

(Testimony of S. A. Madge.)

A. Yes, sir, and people come down,—(interrupted).

Q. And people come down from Portland and go over there to spend Sundays?

A. Yes, sir; and they pass his place of business carrying their demijohns and he concluded that if he would put in a different line of goods, fill his cases with good goods, that he would get that trade,—(interrupted).

Mr. COLE.—I object to that.

Objection sustained. **[68]**

Q. That is far enough on that. You spoke about double-stamped goods. Maybe some of the jurors do not know what double-stamped goods is. You have been in the revenue service. Please tell them.

A. Double-stamped goods is straight distillery goods. It is shipped from a bonded warehouse, carrying a double stamp, never having been touched in any way.

Q. What about its cost? The cost of double-stamped goods?

A. It depends on the age of the goods. Some double-stamped goods are not very good goods, that is, some distilleries do not put out as good goods as others; it depends on the age of the goods.

Q. What do you know about the age of Mr. Black's goods?

A. Well, he had some very old liquors, re-imported goods; re-imported goods are goods that are taken across the water and brought back here to increase the quality of the liquor. That is the purpose

(Testimony of S. A. Madge.)

of sending it across and back. They are sent over to Europe and brought back here for the purpose of giving them a sea voyage.

Q. Do you know something about the cost of such goods, the value of such goods, such liquor?

A. Yes, sir.

Q. Do you know about what they cost per gallon, barrel, etc.?

A. Well, Old Crow would cost in the neighborhood of,—three-year old, when it would be put out of bond, would cost in the neighborhood of three to four and a half a gallon; that is the younger age.

Q. For instance, if a person kept that for several years, supposing he got a barrel of these double-stamped goods **[69]** in 1903 and it cost three or four and a half a gallon, what would be its value six or seven years later?

Mr. COLE.—I object to this evidence on the ground that the witness is not qualified to give it, and I move that the last answer be stricken.

Objection overruled. Motion denied. Exceptions allowed.

A. Those goods would be worth from seven to ten dollars a gallon; if ten years old, it is worth seven dollars, and some of it ten dollars, and Old Crow, I think, would be worth at least ten dollars a gallon, ten years old.

Q. What is liquor worth that is six years old?

A. It would be worth five or six dollars a gallon. It is a lot owing to the amount of absorption, the amount of liquor lost. Some barrels will char

(Testimony of S. A. Madge.)
quicker than others, and the proof will run up higher; that means there is a loss of quantity in the barrel and a higher proof.

Q. Did you find Mr. Black's saloon any different from the general run of saloons, about carrying fine liquors? A. Yes, sir.

Q. What was the difference?

A. Well, it was a higher class saloon.

Q. What was the condition of the stock as being well supplied or meagerly supplied?

A. Oh, he had a large supply of liquors.

Q. How about the cigars, if you know?

A. Well, I do not distinctly remember, although I think he kept a pretty fair supply of cigars; that is my impression.

Q. You spoke a moment ago about the fact that he did not [70] carry rectified goods. What do you mean by rectified goods?

A. Rectified goods are compounded goods. Certain wholesalers and rectifiers have a license to rectify goods, and they take alcohol and green whiskey and mix them together, putting water in and bring the proof down to about sixty or eighty-five, somewhere along there, and put coloring matter in there, and sometimes caramel, to give it a mellow taste.

Q. You say there was none of that kind of goods in his place?

A. I do not think he had a single bit of rectified goods in his place.

Q. You spoke of the bottled goods being double-

(Testimony of S. A. Madge.)

stamped goods, bottled in bond?

A. Yes, sir. I think all of his goods were bottled in bond.

Q. What do you mean to—what did that signify to a man who understands?

A. They are bottled under Government supervision at the bonded warehouses at the distilleries, and they are bottled at 100 proof and the Government stamp is put over the cork. There is a very heavy penalty for refilling any of these bottles. It is our duty to see that none of these bottles are refilled.

Q. What,—you—were these liquors you spoke of, were they in Mr. Black's saloon in Ilwaco?

A. Yes, sir; they were.

Cross-examination.

(By Mr. COLE.)

Q. When was the last time you were in Mr. Black's saloon?

A. Just about five years ago. I was in his saloon, I think [71] only once after he moved up to Long Beach.

Q. That was the same year that he moved up to Long Beach, was it? A. Yes, sir; I think it was.

Q. That was in 1908? A. Yes, sir; in 1908.

Mr. COLE.—I move that all of the testimony of this witness be stricken out on the ground that it is too remote from the time of the fire.

The COURT.—Motion denied. Exception allowed. Gentlemen of the jury, you will understand that this fire is alleged to have occurred in June, 1912,

(Testimony of S. A. Madge.)

and this evidence concerning the character of the stock of goods that the plaintiff carried is admitted simply as a circumstance from which you are to determine the class of business that he was conducting, as rendering it reasonable or unreasonable that he continued to carry valuable or cheap goods, as contended by one side or the other.

Q. You know nothing whatever as to the quality or quantity of goods he had on hand at the time of the fire, do you?

A. Nothing at all,—I say nothing,—personally, I do not. As deputy insurance commissioner this matter was brought to my attention by Mr. Black, and I think I had some dealings with the company about it, that is the only knowledge I have.

Q. You have no knowledge yourself?

A. No, sir; none whatever.

Q. Now, I will ask if he had any Old Crow on hand at the time you were down there?

A. Yes, sir; he did. **[72]**

Q. Do you know where he bought it?

A. No, sir; I do not.

Q. I believe you testified on direct examination also that the barrels were all tapped?

A. I think nearly every barrel that he had was tapped. He may have had one or two new barrels in there at different times when I was there that had not been tapped, but, ordinarily, he had them all tapped.

Q. What do you mean when you say that this whiskey was all bought in bond?

(Testimony of S. A. Madge.)

A. I took it that it came direct from the bonded warehouse. He might have bought it from an agent or anyone else, but it is shipped direct from the distillery warehouse. They ordinarily buy in large quantities, from ten to twenty barrels, and then have it shipped as they want it.

Q. If this liquor was shipped to a wholesale house in Portland, you would not say that it was bought in bond?

A. If it was shipped from the bonded warehouse to Portland, and then reshipped from there, of course, it would not be bought in a bonded warehouse.

Q. You would not say it was bought in bond under those circumstances? A. Oh, no.

Q. In regard to the age of this liquor, is it not a fact that the evaporation and the decrease in the quantity of liquor offsets the decrease,—in other words, if liquor is three years old, a barrel is not worth more than when it is first taken out of bond?

A. Oh, yes, it is. If the evaporation is only a few gallons, the increase is quite rapid, it is doubled, almost. [73]

Q. There would be evaporation of several gallons in old liquor? A. Yes, sir.

Q. And the increase in price,—but that would more than offset the decrease in the quantity in the barrel? A. Oh, yes; undoubtedly.

Q. This evaporation takes place on account of the wooden barrels? A. Yes, sir.

Q. Do you know about what percentage this

(Testimony of S. A. Madge.)

liquor increases per year?

A. Increases per year in value, do you mean?

Q. Yes.

A. No, sir, I could not,—it would depend entirely on the test of the liquor, as to how much evaporation there was.

Q. Is it not a fact that some liquor eight or ten years old may not be worth any more than it was when it was barrelled?

A. Oh, no; if it is kept in the barrel; it is bound to increase in value.

Q. Is it not a fact that the price of that old liquor depends on the amount on hand, the amount in the market? A. What is that?

Q. Is it not a fact that the price of that old liquor depends on the amount of goods that is on the market?

A. I presume that would have some effect on the price of it, although—(interrupted).

Q. Supposing a lot of goods, seven or eight year old goods were on the market, would that make a difference in the value?

A. I think it would. [74]

Q. Supposing quite a lot of 1903 goods were on the market to-day, would not that have some effect on the price? A. I think so, if it was overstocked.

Q. You thought that Old Crow five or six years old is worth five or six dollars a gallon?

A. Yes, sir.

Q. What is that worth when taken out of bond?

A. Depends on when it is taken out. It has got to

(Testimony of S. A. Madge.)

be two years old, and it has got to be taken out when it is eight years old. It depends on the—it would depend on when it was taken out. If taken out when young and green, it is not worth as much as when it is allowed to mature.

Q. Now, is it not a fact that this liquor that is taken out of bond does not increase in value much in the first three years?

A. Yes; of course, it would depend on the warehouse. The Sunnybrook whiskey, I think, they keep their goods in a heated warehouse, with the result that in three years you get Sunnybrook that is 109 proof. I do not know any other distillery that uses that method.

Q. Take a whiskey and give it an ocean voyage, as you said, and in a few months you have a whiskey that is eight or ten years old?

A. It ages quite rapidly, because it gives it a great,—the action of the boat keeps it all stirred up all the time, and then when it settles, of course, it is the same as if it had been standing for some time. It ages it.

Q. That is the cheapest way to give it age?

A. Yes, sir; that is the cheapest way to give it age,—I [75] believe that is the cheapest way to give it age.

Q. You do not know whether his whiskey was aged by water or Father Time?

A. Some of it was aged by water and time both,—some of it was reimported. He had two barrels there,—I am not a drinking man at all; I very seldom

(Testimony of S. A. Madge.)

take a drink, but I have taken a drink of that liquor.

Q. You think the decrease in the quantity of the liquor would not offset the increase in quality?

A. No, sir; not in price.

Q. But it would nearly offset it?

A. No, sir; I would not think so.

Q. Supposing you bought a barrel of liquor in 1908 and kept it three years, and it cost you, we will say, a hundred dollars a barrel, what would that be worth if kept in wood at the end of three years?

A. About a hundred and eighty dollars.

Q. About a hundred and eighty dollars?

A. Yes, sir; on the same basis.

Q. You gain almost twenty-five per cent a year, would you? A. Yes, sir.

Q. That is a pretty good investment?

A. It is a pretty good investment, and that is the way the better saloon keepers make their investments. They buy their goods in bond, two or three years old, and leave it there and take it out as they want it; they leave it there five or six years, or seven years; buy twenty or forty barrels of liquor in bond.

Q. You do not mean to tell this jury that a barrel of whiskey increases eighty per cent in value in three years? **[76]**

A. No, sir; not eighty per cent in three years.

Q. A barrel of whiskey bought for one hundred dollars, you think is worth a hundred and eighty dollars in three years? Is it not a fact, that Mr. Black paid a hundred dollars a barrel for his Old Crow whiskey? A. I do not know.

(Testimony of S. A. Madge.)

Q. Do you know where he bought it?

A. No, sir; I do not.

Q. And I believe you testified that Old Crow from six to ten years old is worth seven to ten dollars a gallon? A. Yes, sir.

Q. That is wholesale? A. Yes, sir.

Q. Did you ever handle wholesale goods?

A. No, sir; I never handled liquors of any kind.

Q. You are not familiar with the value of whiskies?

A. I guess not now. I was at that time. I do not know how liquors are to-day, whether cheap or not.

Q. You never bought or sold liquors, of course?

A. No, sir; but I had occasion to ascertain the value of liquors when I was in the service.

Q. Did you give Mr. Black a wholesale liquor license?

A. We gave Mr. Black a malt liquor license, if I remember, now.

Q. Did you ever have anything to do with arresting him or fining him? A. No, sir; I never did.

Q. You issued Mr. Black a wholesale malt liquor license?

Mr. LANGHORNE.—I object to that as not proper cross-examination and immaterial and irrelevant.

Mr. COLE.—It certainly is material. If he made use of the [77] liquors he had on hand, we want to show something about his disposing of them.

Objection sustained. Exception allowed.

Q. I will ask you whether or not Mr. Black ever

(Testimony of S. A. Madge.)

sold any liquors at wholesale? Answer that question.

A. He,—(interrupted.)

Mr. LANGHORNE.—I object to that as immaterial and having no bearing upon the real issue, not cross-examination.

Objection sustained. Exception allowed.

Q. You say you do not know anything about the supply of cigars he had on hand?

A. Oh, just an indistinct remembrance. I would not want to testify as to his cigars.

Q. You said that he had no cheap goods. He had a few cheap goods on hand, didn't he? Didn't he have some Wicklow whiskey on hand?

A. I do not believe that he did in the Ilwaco store. My recollection is,—it is possible that he did have a barrel of it. I would not say for sure, but my recollection is that it was good grades all the way through.

Q. How many barrels of Old Crow did he have on hand?

A. I could not tell you that,—I could give it approximately,—no, I could not tell you.

Q. Do you know how many barrels of Hermitage?

A. No, sir.

Q. Did that come in bottles?

A. Mostly bottles.

Q. Do you know how many barrels of Green River he had, or did you see any?

A. I do not recall the Green River. I do not recall his having [78] any Green River at that time.

(Testimony of S. A. Madge.)

Q. He did not have any Penwick Rye Whiskey?

A. It seems to me he did.

Q. You would not say for sure, however?

A. Well, I am quite sure he did.

Q. How many barrels?

A. One barrel, is my recollection—(interrupted.)

Q. How is that?

A. I could not tell you the brands of that stock, but I have an indistinct recollection of the different lines of goods that he had, that is, a general remembrance of the stock, is all.

Q. You know of the high quality of the stock and that is about all you know about it?

A. Yes, the character of the goods he carried struck me as being remarkable.

Q. Being a good quality of goods?

A. Yes, sir; being a good quality of goods.

Q. As to the number of barrels or particular kind or the size of his stock, you have no information?

A. No, sir; the number of barrels or the size of the stock.

Q. What was the number of barrels?

A. He had, I would say, fifteen, possibly he had one or two racks, and he had possibly more, two or a third rack. I could not be positive about that, but there was two racks, I know, along the side of the room.

Q. They were all in the front room?

A. I think they were all in the front room; he might have had a few barrels untapped in the back room.

(Testimony of S. A. Madge.)

Q. Did you see any case goods at all? [79]

A. Do you mean bottled goods?

Q. Yes.

A. Oh, yes; he carried a large line of them.

Q. About how many cases?

A. Oh,—(interrupted).

Q. Do you think there were twenty-five?

A. Oh, more than that. He had a large line of case goods.

Q. You do not believe he had fifty?

A. I should say there were.

Q. You would not swear it was fifty, would you? Do you mean that?

A. No, sir; I do not think I ever counted them, but I know he had a lot of them.

Q. The case goods were all in the back room?

A. No, sir; they were not; some of them were in the front room across, right straight across from the bar, I recollect, and then some back in the other end of the room. The case goods were on one side of the room and the barrel goods on the other.

Q. That is in the front room where the bar was?

A. Yes, sir. I am talking about the Ilwaco saloon. I am not talking about the Long Beach saloon. I have not a very distinct remembrance at that place.

Q. About how much would a barrel of liquor evaporate in eight years in wood?

A. Well, I do not know how much it would, probably,—in fact, I have forgotten at the present time; it has been so long since I have been in the service that I have forgotten.

(Testimony of S. A. Madge.)

Q. Supposing a man bought Old Crow Whiskey from the wholesaler instead of buying it in bond would you say that the value **[80]** of that liquor would increase,—(interrupted).

A. That would be exactly the same thing, whether it came from the bonded warehouse or the wholesaler, double-stamped goods cannot be touched,—(interrupted).

Q. Regardless of how old it was when it was bought? Does it go on increasing in the same proportion every year?

A. Oh, yes; in wood. If it is kept too long it will deteriorate instead of increasing.

Q. Is it not a fact that bottles or goods in glass deteriorate?

A. It does not deteriorate, but it does not increase at all.

Q. Would it deteriorate if kept in a warm room?

A. Yes, it might possibly, but I do not hardly think so. They remain about the same.

(Witness excused.) **[81]**

October 21st, 1913, 2:00 P. M.

Mr. LANGHORNE.—If the Court please, I would like to offer in evidence and read certain depositions. I am going to offer in evidence now the deposition of Robert L. Wolfler, a resident of Chicago, Illinois, which was taken upon stipulation.

Mr. COLE.—We took that deposition but I suppose it is admissible by either party.

The COURT.—It may be admitted.

Mr. LANGHORNE.—Gentlemen of the jury, I will now read to you the deposition of Mr. Robert L. Wolfler, a resident of Chicago, Illinois (reading):

[Deposition of Robert F. Woelffer.]

"Interrogatory Number 1. State your name and residence.

A. Robert F. Woelffer, 2426 Burling St., Chicago, Illinois.

Interrogatory Number 2. State what, if any, position you occupy with the firm of Julius Kessler & Company, of #337 West Madison Street, Chicago, Illinois.

A. I am secretary of Julius Kessler & Company, Inc., and as such I have access to all the records of the company.

Q. State whether or not the firm of Julius Kessler & Company ever sold and delivered to William Black, of Long Beach, Washington, five barrels of Cedar Brook McBrayer's whiskey. If so, state the date when said goods were sold and the price received therefor.

A. On or about April 2, 1910, Mr. E. G. Brown, a salesman, in the employ of Julius Kessler & Co., Inc., called upon William Black at his place of business at Long Beach, Washington, and sold him five barrels of McBrayer's Cedar Brook whiskey, for which warehouse receipt #42,848 was turned over to Mr. Black. These five [82] barrels were sold to Mr. Black in bond at $1.05 per proof gallon contents original entry F. O. B. Distillery, and the total price

(Deposition of Robert F. Woelffer.)

of $257.33 has been paid to Julius Kessler & Company; and Mr. Black was to order shipments of the whiskey as his business needs required. The five barrels sold Mr. Black were serial #72,263 and 72,264 and 72,265 and 72,266 and 72,267, and upon written instructions of Mr. Black one barrel serial #72,263 was withdrawn and shipped to Black at Long Beach, Washington, on or about April 30, 1910, and the four remaining barrels serial numbers 72,264 and 72,265 and 72,266 and 72,267 were withdrawn and shipped about December 29, 1910; and upon such withdrawal Mr. Black paid warehouse charges and Government tax, being $39.55 on serial numbers 72,263 and $159.34 on numbers 72,264 and 72,265 and 72,266 and 72,267.

Q. State whether or not the firm of Julius Kessler & Company ever sold and delivered to William Black any other goods. If so, state the dates and the price paid therefor.

A. We have no record of any other sale.

Q. State whether or not the freight on said goods was paid by the buyer or seller.

A. Bonded whiskey is sold F. O. B. Distillery and the buyer therefore paid the freight.

Q. State whether or not the price at which said goods were sold included the freight.

A. It did not.

Q. Produce and attach to your deposition and mark same Exhibit 'A' for identification, statement or duplicate invoices of all goods sold and delivered

(Deposition of Robert F. Woelffer.)

to William Black by the firm of Julius Kessler & Company.

A. Invoice is hereto attached dated April 29, 1910, for $257.33 and marked Exhibit 'A' for identification; and [83] copies of tax statement by Mr. Black of Government tax and warehouse charges of $39.55 on one barrel withdrawn April 30, 1910, is marked Exhibit 'B' for identification, and $159.34 on four barrels withdrawn December 29, 1910, marked Exhibit 'C' for identification, are produced and attached herewith.

Cross-interrogatories.

Q. State whether said whiskey improves in quality and value by being aged in wood.

A. It does. Old goods being more mature are in more demand by reason of age and shrinkage and higher in price.

Q. State the value of said liquor at the present time so aged."

Mr. COLE.—That is objected to as being immaterial and irrelevant, on the ground that they are only entitled to recover on the value of the goods at the time of the fire, if they are entitled to recover at all, and not at the present time.

Mr. LANGHORNE.—It is not now the time to make objections to these interrogatories.

The COURT.—Read the stipulation.

Mr. LANGHORNE.—(Reading:) "It is hereby stipulated and agreed by and between the plaintiff and defendant in the above-entitled action, by their respective attorneys, as follows: That the deposition

(Deposition of Robert F. Woelffer.)

of Robert F. Woelffer, a resident of Chicago, Illinois, may be taken before John M. Quinlan, a notary public in and for the State of Illinois, residing at Chicago, Illinois, upon and pursuant to the interrogatories and cross-interrogatories hereto attached, at such place or places in the said city of Chicago, Illinois, as said notary public may designate; it is further stipulated and agreed that said [84] deposition may be taken at any time prior to the 1st day of October, 1913, by said notary, and that the taking of said deposition may be adjourned from time to time and place to place within said city of Chicago, Illinois, by said notary. It is further stipulated and agreed that all notice in regard to the time and place of taking said deposition, or the issuance of a commission therefor, is hereby expressly waived; that said deposition may be taken by said notary and by him forwarded to the clerk of the United States District Court at Tacoma, Washington, by mail or other means of conveyance. It is further stipulated and agreed that when said deposition is taken and completed it may be introduced in evidence at any trial of the above-entitled action by either of the parties hereto; all objection to the manner and form of taking said deposition, or of certifying or returning the same, is merely expressly waived; that the answers of the witness to said interrogatories may be taken down in shorthand or otherwise by said notary, or any person under his direction, and transcribed by said notary or person under his direction, before

(Deposition of Robert F. Woelffer.)

being signed by said witness.

(Signed) J. J. BRUMBACH,
Attorney for Plaintiff.
COEN COLE,
Attorney for Defendant."

The COURT.—Objection overruled. The jury will understand that it is the value of the property at the time of the fire that is the question that you are to determine, although this question is broader than that, and refers to a later time.

Mr. LANGHORNE.—(Reading:)

"Answer to Interrogatory Number 9. It is hard to state exactly the present value of the [85] goods sold Mr. Black as above; but I might say that the approximate value would be $3.00 per gallon which amount would comprise the original cost to which must be added the Government tax, warehousing charges, freight, insurance and such other expenses as might have been incidental to the handling of the goods.

(Signed) ROBERT F. WOELFFER.

Subscribed and sworn to before me this 12 day of September, 1913."

I will offer in evidence, if the Court please, the deposition of J. Freedlund, taken under the same identical stipulation.

The COURT.—You may read it.

[Deposition of Julius Friedland.]

Mr. LANGHORNE.—(Reading:)

"Q. State your name, residence and business.

A. Julius Friedland; residence, 475 Salmon St.,

(Deposition of Julius Friedland.)

Portland, Oregon. My business is the liquor business.

Q. State what position you hold, if any, in the firm of Blumauer & Hoch.

A. Salesman for Blumauer & Hoch.

Q. State whether or not the firm of Blumauer & Hoch ever sold and delivered to William Black five barrels of Old Crow whiskey. If such sale was made state the date thereof, and the amount paid by Mr. Black for said goods.

A. Yes. We made that sale. Billed on June 26, 1909. $535.00 F. O. B. Distillery at Frankfort, Kentucky.

Q. State whether or not the firm of Blumauer & Hoch ever sold and delivered to William Black three barrels of Green River whiskey. If such sale was made state the date thereof, and the amount paid by Mr. Black for said goods.

A. Yes. We sold him five barrels of Green River April 2, 1908; total amount, $500.25, which would make three barrels about $300.00.

Q. State whether or not the firm of [86] Blumauer & Hoch ever sold and delivered to William Black three barrels of Penwick Rye whiskey. If such sale was made state the date thereof, and the amount paid by Mr. Black for said goods.

A. Yes. On the same date. Five barrels amounting to $509.75, April 2, 1908. Value of these three barrels would be about $306.00.

Q. State whether or not the firm of Blumauer & Hoch ever sold and delivered to William Black four

(Deposition of Julius Friedland.)

cases of Old Crow Bourbon whiskey. If such sale was made state the date thereof, and the amount paid by Mr. Black for said goods.

A. Yes. On November 30, 1908, we sold him five cases of Old Crow of the value of $65.00. Four cases would be worth $52.00.

Q. Produce and attach to your deposition and mark same Exhibit 'A' for identification, duplicate invoices or statement of all goods which the firm of Blumauer & Hoch has sold and delivered to William Black, either at Ilwaco or Long Beach, Washington.

A. The said invoices are attached and marked Exhibit 'A' for identification.

Q. State whether or not the goods hereinbefore specifically mentioned were delivered to Mr. Black at Ilwaco, or Long Beach, Washington.

A. These five barrels of Green River and five barrels of Penwick Rye, invoice of April 2, 1908, were billed to Ilwaco, Washington, and the remainder to Long Beach. Shortly after the arrival of these goods Mr. Black moved to Long Beach.

Q. State whether or not the firm of Blumauer & Hoch ever received from William Black as credit on goods sold to him a twenty-five barrel certificate. If so, explain in detail what said certificate was.

A. Yes. We took from him a certificate for twenty-five [87] barrels of Sunnybrook whiskey on November 19, 1908, and gave him credit for $1,029.37. The above certificate called for twenty-five barrels of Sunnybrook whiskey in bond at the distillery. Black found that he could not handle

(Deposition of Julius Friedland.)

such an amount of one brand so he turned the certificate over to us and we gave him credit.

Cross-interrogatories.

Q. State whether all of said liquor in barrel does or does not improve in quality and value when aged in wood. A. Yes.

Q. If your answer is that it so improves, state what the yearly increase of value is. State in full.

A. That is a very hard question to answer as it would, to a great extent depend upon the brand, age and also the number of barrels of such brand and age that were in the market.

(Signed) JULIUS FRIEDLAND."

Mr. COLE.—We object to all of that testimony unless it is shown that he had these goods on hand at the time of the fire.

The COURT.—Objection overruled. Gentlemen of the jury, you will understand that one part of the case goes in at one time. This evidence you will disregard, unless you find there were goods of this character in the place at the time of the fire, by other evidence, as this witness is testifying from a distance. If the plaintiff did not have such goods in his place when the fire occurred, he would not be entitled to recover.

Mr. LANGHORNE.—I will now offer in evidence the deposition of Joseph Greenbaum.

The COURT.—Taken under the same stipulation?

Mr. LANGHORNE.—Yes, all of these depositions were taken under [88] practically the same form of stipulation, I believe.

Mr. COLE.—The objection as to the form is waived, but they may be objected to as immaterial.

The COURT.—Proceed.

[Deposition of Joseph Greenbaum.]

Mr. LANGHORNE.—(Reading:)

"Q. State your name and residence.

A. Joseph Greenbaum and my residence all my life has been Louisville, Ky.

Q. State what, if any, position you occupy with the firm of Greenbaum Bros. of Louisville, Ky.

A. I am creditman of Greenbaum Bros. and a member of the firm; have acted continuously in said position for the last fifteen years.

Q. State whether or not the firm of Greenbaum Bros. ever sold and delivered to Mr. William Black, of Long Beach, Washington, any liquors or other goods. If so, state the amount thereof, date and price received therefor.

A. They did sell him whiskey on these different occasions which are as follows: July 22, 1911, $234.79; July 19, 1911, $53.75; April 2, 1912, $169.45. These are all the sales shown by our ledger and hence *this all* we sold him.

Q. Produce, attach to your deposition and mark Exhibit 'A' for identification, statement or invoices of all goods ever sold by the firm of Greenbaum Bros. to William Black, of Long Beach, Washington.

A. I herein attach the (3) three invoices of sales made said Wm. Black of Long Beach, Washington,

(Deposition of Joseph Greenbaum.)

referred to by me in my former answer, and for identification mark them Exhibits 'A,' 'B' and 'C.'

Q. State whether or not the sale price of such goods included the freight thereon to Long Beach, Washington.

A. These sales prices as shown in the invoices filed in my former answer included the freight, but we only prepaid [89] freight on (1) one shipment, namely July 22, 1911, which he afterwards paid us. All goods were sold F. O. B. Louisville, Ky.

Q. State by whom the freight on any goods shipped by Greenbaum Bros. to William Black was paid.

A. As I stated in my former answers, William Black paid the freight on shipments of July 19, 1911, and April 2, 1912, and Greenbaum Bros. paid the freight on the shipment of July 22, 1911.

(Signed) JOSEPH GREENBAUM."

We offer in evidence the deposition of William P. Penick, under stipulation.

The COURT.—Read it.

[Deposition of William P. Penick.]

Mr. LANGHORNE.—(Reading:)

"Q. State your name and residence.

A. My name is William P. Penick and I reside in Anchorage, Kentucky.

Q. State what, if any, position you occupy with the firm of Brown-Foreman Company.

A. I am treasurer of the company and have continuously held said position since January, 1902.

(Deposition of William P. Penick.)

Q. State whether or not the firm of Brown-Foreman Company ever sold and delivered to William Black, of Long Beach, Washington, any liquors or other goods. If so, state what liquors were sold, the date thereof, and the price received therefor.

A. They did sell him whiskey and various liquors on five different occasions and the amounts and dates of sales are as follows: March 7, 1910, $146.05; May 17, 1910, $178.45; July 30, 1910, $51.00; September 13, 1910, $87.38; January 25, 1911, $162.43; and these are the only whiskies we sold him.

Q. State whether or not the firm of Brown-Foreman Company ever sold and delivered to William Black of Long Beach, Washington, one barrel of Fox Mountain whiskey. If so, state the price received therefor and [90] the date when said sale was made.

A. I produce and attach hereto as Exhibits 'A,' 'B,' 'C,' 'D' and 'E' for identification the five invoices covering sales, itemized, including prices and dates of sales as set forth in my answer to question No. 3.

Q. State whether or not the price for the liquors heretofore mentioned included the freight thereon to Long Beach, Washington.

A. No. These goods were sold F. O. B. San Francisco, California, and shipped from San Francisco, Cal. The freight was prepaid on the shipments of March 7, 1910, and May 17, 1910, only, and amount of prepaid freight was included in the charges as shown by Exhibits 'A' and 'B.'

(Deposition of William P. Penick.)

Q. State who paid the freight on any goods shipped by Brown-Foreman Company to William Black.

A. We paid the freight on shipments of March 7, 1910, and May 17, 1910, as I explained in my preceding answer; the other three shipments were forwarded freight charges collect.

Q. Produce, attach to your deposition and mark Exhibit 'A' for identification, statement or invoices of all goods sold by the firm of Brown-Foreman Company to William Black, of Long Beach, Washington.

(Signed) WM. P. PENICK."

I will now offer the deposition of William E. Hull, taken under stipulation.

The COURT.—You may read it.

[Deposition of William E. Hull.]

Mr. LANGHORNE.—(Reading:)

"Q. State your name and residence.

A. William E. Hull.

Q. State what, if any, position you occupy with the firm of Clark Bros. Distilling Compay of Peoria, Ill.

A. General Manager of Clark Bros. & Company.

Q. State whether or not the firm of Clark Bros. Distilling Company ever sold and delivered to **[91]** William Black, of Long Beach, Washington, two barrels of Clark Bros. Whiskey. If so, state the date when said sale was made and the price paid therefor.

A. Clark Bros. & Company never sold directly to William Black, Long Beach, Washington, two bar-

(Deposition of William E. Hull.)

rels of whiskey. It may be that whiskey manufactured at our distillery was sold to him through some jobber in the west.

Q. State whether or not the firm of Clark Bros. Distilling Company ever sold and delivered to William Black of Long Beach, Washington, any other liquors.

A. We never have sold William Black any other liquors directly.

Q. State whether or not the freight on said goods was paid by the buyer or the seller.

A. We could not state whether the freight was paid by any dealer selling them or not.

Q. State whether or not the price at which said goods were sold included the freight.

A. We cannot answer this question because we have no record of any of our goods being sold to the said William Black.

Q. Produce and attach to your deposition and mark the same Exhibit 'A' for identification, statement or duplicate invoices of all goods sold by the firm of Clark Bros. Distilling Company to William Black.

A. We cannot produce Exhibit 'A' because we have never sold directly to the said William Black.

Cross-interrogatories.

Q. State whether said whiskey improved in quality and value by being aged in barrels.

A. Our whiskey when manufactured sells at a given price and improves at the rate of about ten cents per year per gallon in quality; in other words,

(Deposition of William E. Hull.)

a three-year old whiskey is worth to the jobber about thirty cents a gallon more than its original selling price.

Q. State [92] what the increase would be and what the value of said liquor is now, aged as aforesaid.

A. Answered in the above answer as nearly as possible.

(Signed) WM. E. HULL."

I now offer in evidence the deposition of John Ecklund, taken under stipulation.

The COURT.—Read it.

[Deposition of John Ecklund.]

Mr. LANGHORNE.—(Reading:)

"Q. State your name and residence.

A. John Ecklund, Portland, Oregon.

Q. State whether or not you ever sold and delivered to William Black, of Long Beach, Washington, any goods. If you have, state the amount and the kind of goods sold, and the date and price received therefor.

A. Yes; three cases of Pebbleford Whiskey, August, 11, 1911; $37.50.

Q. Produce, attach to your deposition and mark Exhibit 'A' for identification, statement or duplicate invoice of all goods sold and delivered by you to William Black.

A. Statement hereto attached, marked Exhibit 'A.'

(Signed) JOHN ECKLUND."

I will now offer in evidence the original policy of insurance. It is admitted in the answer.

Mr. COLE.—I do not think we have any objections.

The COURT.—It may be admitted.

Whereupon said policy was admitted in evidence and marked Plaintiff's Exhibit 1 of this date. [93]

[Testimony of Henry Kayler, for Plaintiff.]

HENRY KAYLER, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. State your name to the jury.

A. Henry Kayler.

Q. Where do you live? A. Long Beach.

Q. How long have you lived there, Mr. Kayler?

A. Since 1907.

Q. How old a man are you? A. Sixty.

Q. State whether or not you were agent for the Central National Fire Insurance Company of Chicago, Illinois, at Long Beach in Pacific County, Washington, during the month of June, last year.

A. I was.

Q. Are you the agent that wrote the insurance policy—(interrupted).

A. I did.

Q. (Continuing.) I hand you Plaintiff's Exhibit for identification Number 1. Is that the policy?

A. Yes, that is it.

Q. Do you remember of a fire occurring in Long

(Testimony of Henry Kayler.)

Beach, Washington, on the night or morning of June 27th, 1912?

A. Yes, sir, on June 27th.

Q. Was the property covered by this policy of insurance destroyed by fire to your knowledge?

A. It was.

Q. State whether or not you gave the company any notice of [94] that fire.

A. I telegraphed the next morning, as soon as I got up the nexet morning, and they notified me—(interrupted).

Q. What did you do?

A. I telegraphed to Davenport Dooley & Company, Portland, Oregon, and to the New Hampshire Insurance Company.

Q. Who is Davenport, Dooley & Company?

A. The agents of the company.

Q. General agents? A. Yes, sir.

Q. Where at? A. Portland, Oregon.

Q. Is that the telegram (handing witness paper)?

A. Yes, sir.

Mr. LANGHORNE.—I will offer that in evidence as Plaintiff's Exhibit Number 2.

No objections.

The COURT.—It may be admitted.

Whereupon said telegram was admitted in evidence and marked Plaintiff's Exhibit 2 of this date.

Q. Did you afterwards make out a proof of loss for Mr. Black? A. Yes, sir.

Q. Look at that and state whether or not that is the original (indicating)?

(Testimony of Henry Kayler.)

A. That is one of the copies I made, yes, sir.

Q. To whom was that sent?

A. It was sent to the adjuster.

Q. The adjuster of whom? [95]

A. Davenport, Dooley & Company.

Mr. COLE.—I would like to have the telegram read.

Mr. LANGHORNE.—(Reading:) "Long Beach, Washington, June 27, 1912. Davenport, Dooley & Company, Portland, Oregon. Risk covered by policy, 590,757 burned this morning. Prosecuting attorney on spot investigating. Total loss." Signed by "P. Kayler, Agent."

Q. That is Mr. Black's signature, is it?

A. Yes, sir.

Mr. LANGHORNE.—We will offer in evidence proof of loss.

Mr. COLE.—That is objected to on the ground that it contains property not covered by the policy and on the further ground that it contains a gross and exaggerated value of the property mentioned, and not such proof of loss as is required by the terms of the policy. The policy provides for the insurance of his stock of goods, consisting principally of wines, liquors, cigars, beer, sodas and mineral water and all other goods, wares and merchandise not more hazardous kept for sale by the assured, and he has included in this proof of loss glasses, fixtures and vessels of various kinds, a long list of them, among which are four dozen one gallon demijohns, five dozen one-half gallon, two dozen champagne glasses,

(Testimony of Henry Kayler.)

and so on, twenty-five gross of corks, eight dozen bar and glass towels, and so on, all property that is not for sale by the insured.

The COURT.—The objection will be overruled so far as the gross exaggerations are concerned, the language of the policy is that false and fraudulent reports of loss would invalidate the proof in that regard and the [96] inclusion of these matters that were not covered by the policy, that would be a question of law to be determined by the Court, and the Court is not going to rule that they were not covered by the policy, but, at the same time, it would not invalidate the proof of loss because they were included in there under some mistake.

Exception allowed.

Whereupon said paper was admitted in evidence and marked Plaintiff's Exhibit 3.

Mr. LANGHORNE.—May I interrupt to say it was never intended by the plaintiff that these items were recoverable under this policy? The plaintiff will explain the condition under which the proof of loss was made out and we do not expect to recover for anything that was not covered by the terms of the policy, won't insist upon it.

Cross-examination.

(By Mr. COLE.)

Q. This proof of loss was rejected?

Mr. LANGHORNE.—We object to that upon the ground that it is not proper cross-examination.

Objection overruled. Exception allowed.

A. I believe they did write a letter saying that it

(Testimony of Henry Kayler.)

was not a proof of loss but all other companies, when they had a loss, the adjuster came down himself.

Q. All of your dealings were done by correspondence?

A. This was all done by correspondence; yes, sir.

Q. How long have you lived in Long Beach?

A. Since 1907.

Q. You are a good friend of Mr. Black's, are you not?

A. Sometimes; sometimes I am not.

Q. You have occasional quarrels with him, do you?

A. Sure. [97]

Q. He has thrown you out of the saloon several times when you did not have money to buy a drink?

A. No, sir, never did.

Q. Are you sure about that?

A. Yes, sir.

Q. You and Mr. Black took a trip to San Francisco in connection with some insurance matters?

A. No, sir.

Q. You did not go to San Francisco?

A. I did not go to San Francisco.

Q. Did you meet him in San Francisco?

A. I have never been in San Francisco.

Q. How did you happen to write this policy?

A. Because—(interrupted).

Mr. LANGHORNE.—I object to that as immaterial. The company is bound by it, he is the agent.

The COURT.—Objection overruled. You will understand, gentlemen of the jury, that when a policy is written, which is a contract—the company

(Testimony of Henry Kayler.)

charges a fraud here on the part of the plaintiff; it claims in effect that this property was not worth as much as he reputed it to be, and where fraud is charged, there is a wider latitude given the evidence allowed than in ordinary cases, because we have got to depend whether a man's intentions were honest or not, by all of the circumstances of the case, and the range of the testimony is liable to be very wide in such a case.

Q. Did Mr. Black ask you to write this policy?

A. Yes—well, I had been soliciting him for some time, and he finally agreed to give it to me. **[98]**

Q. How long before the policy was written had he asked you about it?

A. Why, I had been after him for several months before that.

Q. To get some insurance? A. Yes, sir.

Q. Mr. Black was not in town at the time this policy was written, was he?

A. No, sir, I do not think he was. He was not home. He was in town when he told me to write it, but he was not at home when I delivered it.

Q. About when was that?

A. Three or four days before I delivered it.

Q. Was it delivered the same day as bears date here, on the 18th day of June?

A. No, sir, two days afterwards, because I was waiting for him to come home.

Q. You delivered it on the 20th?

A. Yes, sir.

Q. You wrote it up on the 18th and kept it until

(Testimony of Henry Kayler.)

he came to Long Beach, and delivered it to him?

A. No, sir, he was not there then. I left it at the house.

Q. How long before the 18th day of June did he request this policy? A. In May.

Q. About what time in May?

Q. Well, sometime about the 18th or 20th.

Q. Did he tell you that he wanted a policy on his stock? A. Yes, sir.

Q. Did he tell you how much he wanted?

A. Yes, sir. [99]

Q. Did he tell you he wanted $5,000.00?

A. Yes, sir.

Q. Did he tell you he wanted some on the saloon building? A. Yes, sir.

Q. On his fixtures? A. Yes, sir.

Q. How much on the saloon and fixtures?

A. $3,000.00.

Q. And $5,000.00 on the stock of goods?

A. Yes, sir.

Q. He was in Long Beach at the time that he told you to go ahead? A. Sure.

Q. About when was that?

A. That was about the 20th.

Q. About the 20th of May? A. Yes, sir.

Q. You did not write it out until about the 18th of June?

A. No, sir, because he had not finished taking stock yet. He was taking an inventory of what he did have and I helped him.

Q. Did you take an inventory of these goods?

(Testimony of Henry Kayler.)

A. I helped to take it.

Q. Where is the inventory now?

A. I think it is in those papers there (indicating).

Mr. COLE.—Mr. Langhorne, will you produce it?

Mr. Langhorne hands paper to counsel.

Q. Is that your handwriting (indicating)?

A. Yes, sir.

Q. You wrote this inventory yourself? **[100]**

A. Let me see it (examining); yes, that is my writing.

Q. Now, did you use this inventory in making up the proof of loss? A. Yes, sir.

Q. Did you go over the articles one by one?

A. I wrote the articles as he counted them.

Q. How did you happen not to make it bigger?

A. That is all that he wanted to pay for it.

Q. He did not want but $5,000.00?

A. He had not been carrying that before. He only carried $2,000.00 before.

Q. And you knew that the stock of goods was $7,000.00 before you wrote out the policy?

A. Yes, sir.

Q. Did you count up these barrels yourself?

A. Yes, sir.

Q. You saw each one of them? A. Yes, sir.

Q. You saw the four barrels of Old Crow?

A. Well, I know there was—yes, there was four barrels of Old Crow.

Q. They were all tapped? A. No, sir.

A. None of them tapped?

A. There were four barrels altogether that were not tapped.

(Testimony of Henry Kayler.)

Q. How many barrels of Old Crow were tapped?

A. I think there was only one.

Q. How much drawn out?

A. I do not remember now.

Q. Was there any drawn out? **[101]**

A. Sure. I drank some of it myself.

Q. The other four were never tapped?

A. No, sir.

Q. Had never been tapped? A. No, sir.

Q. How many barrels of Green River was there?

A. I think there were three.

Q. Now, just a minute. While we are on this Old Crow. You bought a good deal of Old Crow whiskey yourself, didn't you?

A. I bought a good deal of it.

Q. And Mr. Bloomfield bought a good deal?

A. No, he bought Green River.

Q. And this whiskey you bought out of a barrel that was tapped or was it out of one that was opened up? A. It was out of one that was tapped.

Q. He paid for five barrels,—he had five altogether?

A. I do not know how many he bought. I know what was there.

Q. You bought this out of that that was tapped?

A. I have drank some of that liquor, but it was mostly too rich for my blood.

Q. You bought liquor off and on for several years?

A. Sometimes, not very often.

Q. You bought out of this same barrel all of the time? A. Well, I could not tell you.

(Testimony of Henry Kayler.)

Q. You saw this Old Crow yourself, did you, these four barrels? A. Sure.

Q. Do you know how much was drawn out of the barrel tapped? A. No, sir. [102]

Q. Did you tap on it? A. No, sir.

Q. Did you top on the other barrels?

A. No, sir.

Q. Did you tap on any of them? A. No, sir.

Q. You do not know whether there was any whiskey in them or not?

A. I know they were very heavy.

Q. You do not know whether it was whiskey or water, do you?

A. No, sir, I could not tell you that, only by the stamps on them.

Q. Where were those case goods stored?

A. Along—(interrupted).

Q. In the back room?

A. In the back room, and some of them in the glass cases.

Q. There were glass cases in the front room?

A. Yes—(interrupted).

Q. Where the bar is? A. In glass cases.

Q. There were none of the case goods in the barroom, were there?

A. There might have been a few cases there.

Q. Where were those case goods stored?

A. Around in the back room, along by the chimney, several feet high, by the ceiling.

Q. On the north side? A. Yes, sir.

Q. That room opens up into the bar room?

(Testimony of Henry Kayler.)

A. Yes, sir. [103]

Q. There is a stove and tables and chairs in there?

A. No, not in the summer-time.

Q. Where were they?

A. The stove was moved out doors.

Q. This fire occurred on the 27th of June. Do you mean to swear there was no stove in there then?

A. Yes, sir.

Q. Any table in there?

A. Tables there, yes, sir.

Q. You are positive of that? A. Yes, sir.

Q. No chairs in there?

A. Yes, there were chairs.

Q. How many chairs? A. Three or four.

Q. You were in there the night of the fire?

A. Yes, sir.

Q. What time did you go in there?

A. About nine o'clock.

Q. You stayed there until half-past eleven?

A. About that, yes, sir.

Q. You were there when the bartender left?

A. Yes, sir.

Q. And you walked home with him?

A. About two blocks.

Q. You left him then?

A. I went off towards my home and he went off towards his.

Q. He took the money over to Mrs. Black?

A. He did that every night, took the money and keys over.

Q. Is that where you left him? [104]

(Testimony of Henry Kayler.)

A. No, sir.

Q. Where did you leave him?

A. Two blocks below, after he had given the keys to Mrs. Black.

Q. You join him again after he gave the keys to Mrs. Black?

A. No, sir, I waited for him until he came out.

Q. Anybody else with you? A. Yes, sir.

Q. Who? A. A man by the name of Phoenix.

Q. Is that Fred?

A. I do not know what his first name is.

Q. You and Mr. Dickinson and Phoenix were the three in there the night of the fire before it was closed? A. Yes, sir.

Q. In there every night?

A. Very nearly every night.

Q. Spent all of your time in there? A. No, sir.

Q. Most of it? A. No, sir.

Q. The majority of it? A. No, sir.

Q. You spent the daytime there? A. No, sir.

Q. Didn't you spend part of the day there?

A. Sometimes, yes, sir.

Q. Where those case goods piled up in the back room? A. Yes, one on top of the other.

Q. As I understand it, these goods in the room were not [105] in the room where the bar was, where the barrel goods were, but the case goods were in the other room joining this? A. Yes, sir.

Q. A door between them? A. No door.

Q. How did you go in there?

A. Just naturally.

(Testimony of Henry Kayler.)

Q. There was an open space where you could walk from the bar room into the back room where the case goods were kept? A. Yes, sir.

Q. No other case goods were kept in any other rooms except these two?

A. He had another room out on the other side where he had some in, and then he had some upstairs.

Q. What did he have off to the side?

A. Some case goods.

Q. How many?

A. I do not know—maybe fifteen cases.

Q. Off to the side? A. Yes, sir.

Q. How many did he have upstairs?

A. I do not know whether he had any of the case goods.

Q. He had some of the upstairs rented for a pool-room? A. Not at that time.

Q. Prior to that time?

A. It had not been for three years.

Q. You took this invoice yourself as I understood you to testify before? [106] A. Yes, sir.

Q. There was no case goods upstairs?

A. Yes, there was, but I did not take an invoice of them.

Q. He did not put those in? A. No, sir.

Q. How many barrels was there in the front room?

A. There were twenty-three or twenty-five, I am not sure which.

Q. Did you take this home (indicating) before you wrote the policy?

A. Had it in my office when I wrote the policy.

(Testimony of Henry Kayler.)

Q. You have had it ever since?

A. I had it until a short time ago, yes, sir.

Q. And you counted each one of these cases, did you? A. Yes, sir.

Q. It says here, "twenty-two cases of Roxbury Rye"; did you count those?

A. Yes, we had quite a tussle with them, because they were sent to Seattle instead of Portland and they had a disagreement on the freight on them.

Q. It came from—(interrupted).

A. From Baltimore.

Q. Were you there when it came?

A. I wrote the letter back to the company for him saying he would not accept it at Seattle, and that they would have to pay the freight from Seattle to Portland.

Q. How long was that before the fire?

A. Three or four months, along in the winter some time. I do not just exactly know the date.

Q. When did the Green River come? **[107]**

A. A long time,—he built up his reputation on Green River.

Q. Was there any goods destroyed in the fire that were not included in this inventory?

A. I think there is. I do not think that he got in what was upstairs.

Q. You do not think he got in what was upstairs?

A. No, sir.

Q. You counted five cases of Joe Gideon Whiskey?

A. Yes, I know when he got that.

Q. Where did he get those?

(Testimony of Henry Kayler.)

A. From Kelly, Portland.

Q. Fifteen cases of Frazier Whiskey. They were there, were they?

A. I cannot say just now, how many cases there were, but I know that he got it from an agent of Bonney Brothers. He had a cottage down there, a man by the name of Fiester.

Q. Four cases of Guggenheimer. Where did he get those?

A. I do not know. I know that he had it there.

Q. What day did you take this inventory?

A. The 18th of May. I know that, because I made an appointment for the 15th and he had not got through moving his stuff in from the back warehouse —he had to move his stuff from the back warehouse into this room.

Q. What time did you start in?

A. About ten o'clock, in the evening.

Q. What time did you get through?

A. We did not work steady. We put in two or three days or a couple of days.

Q. You finished it up about the 20th then?

A. Somewhere about the 20th. I believe it was the 20th, [108] yes, sir.

Q. How about these four cases of Gibson Rye,— did you count those?

A. Whatever is down there is right; I know that.

Q. Isn't it a fact that you made up this list of goods out of your own memory, from—(interrupted).

A. No, sir, this was done by actually counting—he counted them—(interrupted).

(Testimony of Henry Kayler.)

Q. Where were those cases located, what part of the building?

A. As I told you, in the back room, back part of the saloon.

Q. In that back room? A. Yes, sir.

Q. Where were those two barrels of Clark Brothers?

A. Some of it was unpacked and in the show case in the front bar.

Q. Is this proof of loss identical with this inventory here?

A. I do not know whether—I think it is pretty nearly.

Q. Did you copy it off? A. Yes, I think so.

Q. You copied the proof of loss from this, did you, exactly?

A. Well, there were some other things we put in, we had forgotten in the other.

Q. Is there anything in the proof of loss that is not in there? A. I think there is.

Q. What is it?

Q. I know there was some things I had forgotten to put in, that was on the other policy, that was brass work on the front bar and there were several things I had forgotten, the pumps and the pumping system. [109]

Q. What else?

A. I do not know whether those two last barrels that he got were in there or not.

Q. Everything that is on this inventory is on this proof of loss (indicating)? A. I think so.

(Testimony of Henry Kayler.)

Q. Anything more?

A. There might have been a few things that I have forgotten.

Q. Did he say anything to you when he wanted this policy that he was going to fix the insurance company?

A. No, sir; I am not in that kind of business.

Q. He did not say anything to you about that?

A. No, sir. There was a man that wanted to buy him out, and that is the reason that we took the inventory.

Q. You did not take it for the purpose of making the policy?

A. No, sir. I wrote him up on the strength of that, though.

Q. Who was the man who wanted to buy him out?

A. A man by the name of Mack.

Q. He lives in Portland? A. Yes, sir.

Q. Do you know Mr. Mack very well?

A. Not at all, only by correspondence.

Q. Ever see him? A. No, sir.

Q. Have you got those letters that he wrote you?

A. No, sir, I have not.

Q. Did you ever see his letters?

A. I did, and I wrote answers to them.

Q. Where are they now? **[110]**

A. I do not know. I suppose he (indicating Mr. Langhorne) has got them.

Q. Did Mr. Mack come down there?

A. Mack had been down there.

Q. What time did he come down there?

(Testimony of Henry Kayler.)

A. I do not know. Mr. Black can tell you that. I did not know anything about that until I read the letter that he showed me and had me write the answer.

Q. About what date was that?

A. That was along in the fore part of May, some time.

Q. This inventory was shown to Mr. Mack?

A. Certainly.

Q. You do not know what business Mr. Mack is in?

A. I suppose the saloon business. He wanted to go into it.

Q. Isn't it a fact that he is a teamster?

A. I do not know what he is.

Q. Did you write that answer after this was written up or before? A. Before.

Q. Mr. Black showed you the letter that he got from Mr. Mack? A. Yes, sir.

Q. And you wrote the answer?

A. And I wrote the answer that we would take an inventory and let him know what he would take.

Q. What is the reason the deal did not go through?

A. I do not know that.

Q. Mr. Black has never told you about that?

A. I suppose it would have gone through if it had not burned up.

Q. Mr. Black had not said anything to you about insurance at [111] the time that he was talking about selling to Mr. Mack?

A. I had been talking about insurance for a long time before that, that he had agreed to give to an-

(Testimony of Henry Kayler.)

other man, and he told me that the next time he would give it to me.

Q. This sale was all off before he told you to go ahead and write the policy?

A. I do not know whether it was.

Q. When was this sale to Mack called off?

A. I do not know as it was ever called off.

Q. What was this letter you wrote?

A. Well, I wrote a letter that he would take an inventory and let him know later how much he did have.

Q. How long after this letter that you wrote was it before you wrote the insurance policy?

A. Why, I wrote that up—maybe two or three weeks before I wrote the insurance policy.

Q. Mr. Black had not given you any order at that time for insurance, at the time you wrote the letter?

A. No, sir, but he had agreed to—he said if he took a policy he would make the other man pay the premium, and of he did not pay all cash, he wanted to be secure.

Q. Did he pay you anything for getting up this inventory for him? A. Yes, sir.

Q. How much did he pay you? A. Four dollars.

Q. And you were going to help him get up the inventory for the purpose of making this sale?

A. Sure.

Q. Mr. Black never told you whether the deal was called off [112] or not? A. No, sir.

Q. You do not know to this day whether it was called off?

(Testimony of Henry Kayler.)

A. I do not know whether it was called off or not. I know that he was up in Portland on that business and had an operation performed just before the fire.

Q. What time did Mr. Black leave Long Beach for Portland?

A. Why, he was up there, it must have been pretty nearly two weeks, I guess, at the time that he had his nose operated on.

Q. Did he leave Long Beach about the last of May?

A. Yes, somewhere along there.

Q. What part of May was it?

A. Some time about the last of May.

Q. About the 25th?

A. I do not remember the date that he left. I know that he was down there a couple of weeks.

Q. How long did he stay in Portland?

A. I suppose he was in Portland all that time, that he was away.

Q. When did you see him again?

A. I seen him on a Sunday—I guess it was Friday—no, Saturday, the 21st or the 22d.

Q. The Saturday before the fire?

A. Yes, of June.

Q. Where did you see him? A. In his house.

Q. Didn't go to his saloon that day?

A. Yes, I went to his saloon that day, too.

Q. Did you see him at the saloon, too? **[113]**

A. No, sir.

Mr. LANGHORNE.—I do not want to be put in a position of objecting, but I want to object to this as immaterial and not proper cross-examination.

(Testimony of Henry Kayler.)

Mr. COLE.—We contend that Mr. Kayler has a great deal of knowledge about this matter—(interrupted).

The COURT.—Objection overruled.

Q. When did he leave Long Beach again?

A. He left on Monday morning next, it must have been the 24th, I guess.

Q. What time in the morning?

A. He left there on the six o'clock train.

Q. Where did he go? A. He went to Astoria.

Q. Are you sure about that?

A. I know that he went off on the train.

Q. Did he tell you that he was going to Astoria?

A. Yes, sir.

Q. When did you see him again?

A. I did not see him until after the fire.

Q. Don't you know there was a warrant out for him at that time for selling liquors to minors?

A. No, sir.

Mr. LANGHORNE.—I object to that.

The COURT.—Objection sustained.

Q. You saw him the next morning after the fire, did you?

A. I think it was the day after that, the day of the fire was the 27th. I think it was the 28th that I seen him.

Q. Was there any fire in the saloon in the stove at the time you left there on the night of the 26th? [114]

A. I was not in the back part. As a matter of fact, I do not think there was any stove there.

(Testimony of Henry Kayler.)

Q. Any fire there during the day?

A. I was not there during the day.

Q. You did not go in there at all until evening?

A. I generally went in in the evening.

Q. Can you state how many cases of these case goods were in the room where the bar is?

A. No, sir; I cannot recollect now.

Q. Were there ten?

A. Yes, it would take a dozen to fill up his show cases.

Q. Was there any case goods in the room where the bar was that remained in the cases on the 26th, on the day of the fire?

A. I don't think there was. There were two barrels stood there right down by the front door. I remember that, because I sat on one talking with a fellow.

Q. You know there were a couple of barrels in the front room, do you? A. Yes, sir.

Q. And you do not know whether there were any cases in the front room or not?

A. I do not remember whether there was or not that night.

Q. Where were the beer barrels kept?

A. The beer barrels were kept in the cellar.

Q. They were all in the cellar? A. Yes, sir.

Q. Where was the soda water kept?

A. In the back room. He had a kind of a room for people to go in and drink there, he had the soda water in there. **[115]**

Q. Where were the empty bottles kept?

(Testimony of Henry Kayler.)

A. In the back room.

Q. In the room where the cases were?

A. The empty beer bottles were kept in the back room.

Q. That is the room where the case goods were?

A. Yes, sir.

Q. Who put down this valuation of this property here (indicating)? A. I did, I suppose.

Q. You put those valuations down?

A. Yes, sir.

Q. Did Mr. Black tell you those were the figures?

A. Yes, sir.

Q. Do you know what these goods cost, yourself?

A. I am not an expert.

Q. That is the valuation you were going to put on the property to Mr. Mack, was it? A. Yes, sir.

Q. What other whiskey was there in there besides Old Crow and Green River?

A. I think he had pretty nearly every brand on the market.

Q. He had a good deal of it? A. Yes, sir.

Q. The barrels were all empty? A. No, sir.

Q. I mean all tapped?

A. No, sir; they were not all tapped.

Q. Now, a great deal of this whiskey he brought over from Ilwaco, didn't he?

A. He brought over a carload and then there was a wagon **[116]** brought out six barrels.

Q. Those four barrels of Cedar Brook McBrayer he brought over from Ilwaco?

A. I do not know. I was not around there at the

(Testimony of Henry Kayler.)

time that he brought it over. I do not know whether he brought it over from Ilwaco or bought it at Long Beach.

Q. You were not there when he brought it from Ilwaco?

A. I seen the car there and the goods there. I was in and out, but I did not take any notice of it, whether it was McBrayer or Cedar Brook or what it was.

Q. Did you see any cigars around the place?

A. Yes, sir.

Q. How many did you see?

A. Piled up on the back bar, piled four or five high—boxes.

Q. Do you know how long he had those cigars?

A. No, sir; I could not tell you that. I know that he would buy from different people.

Q. Mr. Black called out these different articles and you wrote them down? A. Yes, sir.

Q. Did you sit down at the table to do it?

A. No, sir, stood up at the bar.

Q. He called them out to you? A. Yes, sir.

Q. You did not go around and tap on them yourself? A. No, sir.

Q. You do not know whether this is correct or not?

A. I cannot tell whether a barrel is tapped or not.

Q. You did not compare this with the goods, yourself?

A. No, sir; only as he would call it out; I helped count some [117] of the goods.

Q. When he called out so many cases of a particular brand, did you verify it before putting it down?

(Testimony of Henry Kayler.)

A. No, sir.

Q. Took his word for it? A. Yes, sir.

Q. Also in regard to the value. The particular thing that he did was to report the number of cases and the price?

A. Yes, it was right in sight; I could see pretty well.

Q. Ever work for him before?

A. Done lots of business for him before in different ways.

Q. Had he promised you this insurance at the time you took this inventory? A. Yes, sir.

Q. How long before that?

A. He had been promising it to me for several months.

Q. He had agreed you should write a policy?

A. Yes, sir.

Q. And he had agreed how much it would be?

A. No, he had not said a word about that.

Q. Was this man Mack to have everything in the saloon?

A. No, he wanted the barrel goods particularly.

Q. Did he want the fixtures?

A. He was going to rent the property; I suppose that he would rent the fixtures and all.

Q. Why did you take an inventory of the case goods?

A. I did not take an inventory—I took the whole business to know just what he had.

Q. It was all taken for Mack, for that deal?

(Testimony of Henry Kayler.)

A. Certainly, he was taking it, because he was expecting to [118] sell.

Q. Are you still the agent for this company?

A. No, sir.

Q. Did you ever turn that Black premium over to them? A. Yes, sir.

Q. When was it?

A. Well, just after the fire—(interrupted).

Mr. LANGHORNE.—I object to that as immaterial. If he is the agent of the company, we have nothing to do, nothing to say, whether he tnrned the premium over to them or not.

The COURT.—Objection sustained.

Mr. COLE.—I will change that.

Q. Isn't it a fact that you kept the premium until the spring of 1913 and then only turned it over when you were threatened?

A. No threatening about it—(interrupted).

Mr. LANGHORNE.—Just a minute. We object to that.

Mr. COLE.—I think it goes to show the credibility of the witness on cross-examination.

The COURT.—Objection overruled.

Exception allowed.

Q. Is not that a fact?

A. No, sir. Right after the fire, they ordered twelve policies cancelled, and I had to pay those people back their returned premiums, and I kept that money, because I did not know whether they were going to cancel the whole business or not.

(Testimony of Henry Kayler.)

Q. Isn't it a fact they told you to cancel the whole business? A. No, sir, they did not.

Q. You are sure about that? [119]

A. Yes, I have got a letter there that will show you the number of policies they ordered cancelled.

Q. Isn't it a fact you wrote back and told them they were all cancelled except as to Mr. Black?

A. No, sir.

Q. Never wrote any such letter? A. No, sir.

Q. Isn't it a fact you wrote a letter to them stating you would cancel all policies except Black's policy, and that that was a fire loss? A. No, sir.

Q. Now, isn't it a fact, that you testified for Mr. Black in the liquor cases when he was arrested for selling liquor to minors? A. I did.

Mr. LANGHORNE.—I object to that as immaterial and irrelevant.

The COURT.—The question is answered.

Q. And isn't it a fact that you signed Mrs. Horr's name to a deed down there—(interrupted).

Mr. LANGHORNE.—Just a minute. I object to trying all of the affairs of Pacific County.

Objection sustained.

Mr. COLE.—A matter of impeachment.

The COURT.—How?

Mr. COLE.—It goes to the character of the witness and shows credibility.

The COURT.—You can impeach a witness by his general reputation, but I am not aware that you can impeach a witness by specific occurrences.

Mr. COLE.—Not by other witness, you cannot, but

(Testimony of Henry Kayler.)

by general [120] reputation.

The COURT.—I do not think you can go into a witness' entire life, about all of the things he has done.

Objection sustained.

Q. When did you first hear of the fire, Mr. Kayler? A. The next morning.

Q. Didn't you go over to the fire that night?

A. No, sir. I did not know anything about it until the deputy and the prosecuting attorney came to my place and woke us up.

Q. Woke you up the next morning?

A. Yes, sir.

Q. What time? A. About five or six o'clock.

Q. Who was with him?

A. Mr. Wright, the Prosecuting Attorney, and Mr. Deputy.

Q. And you did not hear a thing of this fire until they came over?

A. That is all I knew about it.

Q. How far did you live from this saloon?

A. About a full five blocks, and the room where we sleep is on the other side of the house. We could not see it over there.

Q. You did not see or hear anything?

A. No, sir.

Q. Did you go to bed right off when you got home that night? A. Sure.

Q. What time did you get home?

A. About half-past eleven I think it was.

Q. It was about half-past eleven when you left

(Testimony of Henry Kayler.)

the saloon, [121] wasn't it?

A. Yes, about that.

Q. Did you ever buy or sell any liquors?

A. I have bought quite a lot.

Q. I mean at wholesale.

A. Yes, I have, once or twice.

Q. You are not familiar with the market value of it, are you? A. I am not.

Q. Did Mr. Black receive any goods during the month of May that you know of?

A. Well, I think he got those two barrels that were rolled into the door there. I think that came in May.

Q. How did you happen to keep this inventory if it was taken for the purpose of trade or making a sale? A. I made it out in triplicate.

Q. What did you do with the other one?

A. Mr. Black got one and sent one to Mr. Mack.

Q. You mailed it yourself?

A. No, sir, he mailed that himself.

Q. You did not mail it. You gave him one and kept one, did you? A. Yes, sir.

Redirect Examination.

(By Mr. LANGHORNE.)

Q. You said you wrote some letters for Mr. Black. Kindly tell the jury why you wrote some letters for Mr. Black.

A. Mr. Black, while he is a pretty good writer, is not a very good speller, and he asked me to write his letters for him once in a while.

Q. Now, Mr. Kayler, in making out this proof of

(Testimony of Henry Kayler.)

loss, there [122] is some items included that do not seem to be covered by the policy, such as bottles and towels and so on.

A. I supposed it was all a part of the stock when I put it down. I never made out any proof of loss. My business was to write it up, the adjuster did that work generally.

Q. You sent the proof of loss to the company or adjuster? A. Yes, sir.

Q. At the time you included those goods, did you believe that those articles I have called your attention to, that they were covered by the policy?

A. Sure.

Q. Did you or Mr. Black include them?

Mr. COLE.—We object to that. It is very plain they are not covered by the policy.

Mr. LANGHORNE.—I do not dispute that. I am not saying that they are covered by the policy.

Objection overruled. Exception allowed.

Q. When you included these articles, was there any intention on your part to defraud the company?

A. No, sir. I supposed everything inside of that saloon was covered.

Recross-examination.

(By Mr. COLE.)

Q. In your report to the company, you stated you believed this fire was of incendiary origin.

A. Well, it did not look good.

Q. And you were satisfied that somebody set it, were you? A. I am.

(Testimony of Henry Kayler.)

Q. Did you see Mr. Black Monday evening of the 24th? A. No, sir. [123]

Q. Did you see him Tuesday evening?

A. I did not see him until Sunday night. That was the last I seen of him.

Q. You did not see him Saturday?

A. Yes, and Sunday.

Q. You didn't see him Monday?

A. Monday morning he went off at eight o'clock.

Q. He left on the train? A. Yes, sir.

Q. Did you go up to his house? A. Yes, sir.

Q. What for?

A. I wanted to ask him some more questions and he was gone.

Q. You left the policy with his wife while he was gone, with Mr. Black's wife?

A. I did not know where the policy was then.

Q. Where did you leave it?

A. I did not have the policy then.

Q. On the 22d? A. No,—the 24th, you said.

Q. The policy was issued on the 24th?

A. No. The policy was issued on the 18th.

Q. Did you give it to Mrs. Black personally?

A. I did.

Q. She was at home? A. Yes, sir.

Q. You did not give it to anyone else in the house?

A. No, sir, I gave it to her in the house.

Q. Mr. Black at that time was in Portland, was he?

A. Yes,—I do not know whether he was in Portland or Astoria. [124]

(Testimony of Henry Kayler.)

Mr. COLE.—I would like to offer this notice of loss in evidence. Is this the notice of loss that you signed? I will offer it as an identification just now.

(Witness examines paper.)

A. Yes, that is the one.

Q. You sent that in to the company's agent in Portland about the time of the loss, about the date that it bears, June 27th, 1912?

A. I think so, or a day or two afterwards; I am not sure which.

(Witness excused.) [125]

Mr. LANGHORNE.—I will offer in evidence the deposition of Mr. Bickart, of the firm of Bluthenthal & Bickart.

The COURT.—Taken under stipulation?

Mr. LANGHORNE.—Yes, sir.

The COURT.—It may be admitted.

[Deposition of Monroe L. Bickart.]

Mr. LANGHORNE.—(Reading:)

"Q. State your name in full and residence.

A. My name is Monroe L. Bickart, and I reside in Baltimore City, Maryland.

Q. State whether or not you are a member of the firm of Blumenthal & Bickart, of Baltimore, Md.

A. I am a stockholder in Bluthenthal & Bickart, Inc., a Maryland Corporation, and I am Secretary-Treasurer of the corporation.

Q. State whether or not the firm of Bluthenthal & Bickart ever sold and delivered to William Black, of Long Beach, Washington, any liquors. If so, state the amount, date and price thereof.

(Deposition of Monroe L. Bickart.)

A. My company made a sale of liquors to William Black, Long Beach, Washington, shipment of which was made under date of August 30th, 1911, amounting to Two Hundred and Fifty Dollars ($250.00), being twenty-five (25) cases of Roxbury Rye, quarts, at Ten Dollars ($10.00) per case, with Five (5) cases Roxbury Rye quarts gratis.

Q. State whether or not said sale included twenty-two cases of Roxbury Rye Whiskey. If so, state the price paid for said whiskey and the date when said whiskey was sold.

A. There was only one sale, as described in answer three, which of course, included twenty-two cases of Roxbury Rye Whiskey.

Q. Produce and attach to your deposition and mark same Exhibit 'A' duplicate invoice or statement of all goods sold and delivered to William Black, by the firm of Bluthenthal & Bickart.

A. Attached [126] is itemized statement of the account, marked Exhibit 'A.'

Q. State whether the freight on said goods sold by the firm of Bluthenthal & Bickart to William Black was paid by the seller or purchaser.

A. The freight was prepaid by Bluthenthal & Bickart, Inc., amounting to Nineteen Dollars and Sixty-three cents ($19.63), and charged to William Black, the terms of the transaction being that William Black was to stand the freight.

Q. State whether or not the price at which you sold said goods included the freight.

A. The price of Ten Dollars ($10.00) per case did

not include the freight. Therefore, the freight was charged as a separate item, as it was necessary to prepay the freight from this end.

(Signed) MONROE L. BICKART."

I will now offer in evidence the deposition of Don H. Dickinson, taken under stipulation.

The COURT.—It may be admitted.

[Deposition of Don H. Dickinson.]

Mr. LANGHORNE.—(Reading:)

"Q. State your name, age and residence.

A. My name is Don H. Dickinson; age, twenty-nine; I am on the corner of Regent and Clackamas Streets, Portland, Oregon.

Q. Where did you reside in 1912?

A. Long Beach, Washington.

Q. How long had you resided at Long Beach, Washington? A. Four years.

Q. When did you leave there for your present residence?

A. I don't remember the exact date, the last month, about the middle of last month.

Q. Did you know the plaintiff, William Black, at Long Beach, Washington? A. Yes, sir.

Q. And for about how long?

A. Knew him the whole time I was there.

Q. Were you in the employ of William Black at Long Beach, Washington, during 1912? [127]

A. Yes, sir.

Q. During what time were you in his employ?

A. I went to work for him about the 27th of May.

(Deposition of Don H. Dickinson.)

Q. Go on with your statement.

A. And was there to the 26th of June, the 26th of June is the last night I was in the place.

Q. Were you in charge of his saloon at the time it was destroyed by fire?

Mr. COLE.—I object to that question and ask that it be stricken out.

The COURT.—Overruled. It is preliminary.

Mr. COLE.—Before proceeding with this, this deposition was taken under stipulation or all interrogatories.

The COURT.—With the objections noted at the time?

Mr. COLE.—The stipulation was that the objections should be taken in Court as if the witness was present. It says, "May be introduced in evidence at any trial of the above-entitled action subject to the same objections that could be taken if said witness were present in Court and testifying."

The COURT.—Read the question.

Mr. LANGHORNE.—(Reading:) "Q. Were you in charge of his saloon at the time it was destroyed by fire?"

The COURT.—What is your point?

Mr. COLE.—It was taken under stipulation that the objections could be reserved and taken at the trial. It says, "Said deposition may be taken without any previous notice of the time and place of taking of said deposition, the notice as to the time and place of taking said deposition being hereby expressly waived; said deposition may be taken and

(Deposition of Don H. Dickinson.)

forwarded by said notary to the clerk of the United States District Court [128] at Tacoma, Washington, and may be introduced in evidence at any trial of the above-entitled action, subject to the same objections that could be taken if said witnesses were present in court and testifying.

The COURT.—Objection overruled. It seems to me that under that stipulation it would be fair to the party if the objections were made at the time and to be ruled on by the Court, then counsel might be willing to concede that his question was faulty and have an opportunity to correct the question if objection is made.

Mr. LANGHORNE.—(Reading:)

"A. Yes, sir.

Q. On or about the 27th day of June, 1912?

A. Yes, sir.

Q. Were you in the sole charge thereof?

A. Yes, sir.

Q. How long previous to the time the said property was destroyed were you in the sole charge thereof?

A. The day I went to work there I had the key turned over to me until the following morning of the fire.

Q. State the reasons, if you know, why Black employed you?

A. He had to come to Portland to have his nose operated on.

Q. What time was it that the said saloon and contents burned?

(Deposition of Don H. Dickinson.)

A. That I could not say, I didn't know a thing about it until about—

Q. I want the date of the fire.

A. It was the 27th of June.

Q. What year? A. 1912.

Q. At what hour, might just as well include that.

A. I didn't know a thing about it until they came and woke me up about a quarter to three, half-past two or a quarter to three.

Q. Go right on and say what time of day or night.

A. That was in the morning about half-past two or a quarter to three.

Q. How late were you in the saloon of the previous day?

A. I closed up the saloon, it was [129] about twenty-five minutes after eleven.

Q. Who was present with you at the time of the closing up?

A. There was Henry Kayler and Ed Phoenix.

Q. Was there at the time of the closing of the saloon at said time any fire in the building?

A. There was during the day, but there was no fire there after I came back from my supper, from my supper hour on.

Q. When did you first learn of the fire?

A. When they came and woke me up in the morning.

Q. Where did you reside at Long Beach during this time?

A. I was about six blocks away from the saloon.

(Deposition of Don H. Dickinson.)

Q. Do you know the cause of the fire?

A. No, sir.

Q. At the time of the fire was there the usual stock in said saloon building? A. Yes, sir.

Mr. COLE.—I think that would be a little bit leading.

Mr. BRUMBACH.—'Was there the usual stock'; answer that yes or no, hardly leading.

Mr. COLE.—I object to that on the ground it is leading."

The COURT.—Objection sustained.

Exception allowed.

Mr. LANGHORNE.—(Reading:)

"Q. Do you know the amount of stock that was in the building at the time?

A. I don't know the exact amount of the case goods, but I know he had either 21 or 22 barrels, I forget just which, of liquor in the front part of the saloon. I know he had quite a number of case goods in the back.

Q. What kind of liquor do you refer to?

A. It was whiskey and wine in the front part. He had whiskey and wines in case goods in back.

Q. During the time that you were in sole charge as heretofore stated, was there any liquors shipped by you by orders of Mr. Black out of said saloon? **[130]**

A. No, sir.

Q. Was there anything shipped out of that saloon during that time? A. Yes, sir.

Q. State what it was.

(Deposition of Don H. Dickinson.)

A. It was nine barrels of empty bottles.

Q. Empty bottles?

A. Shipped to the Astoria Bottling Company.

Q. Where was Mr. Black at the time of the fire?

A. I think he was here in Portland.

Q. Was he at or in the vicinity of Long Beach?

A. Not at the time of the fire, no, sir.

Q. When did he return after the fire?

A. The very next day.

Q. How long previous to the time of the fire did you see Mr. Black and where?

A. It was the Saturday night just before the fire, was the—I think it was on the 22d, and he left on Sunday morning. I guess that was Saturday.

Q. When did you say he left?

A. It was Sunday morning,

Q. What place do you refer to?

A. From Long Beach.

Q. Did you or did you not have anything to do with that fire? A. I did not.

Q. Do you know the amount and value of the liquors that Black had there?

A. No, sir, I don't know the exact amount, I know it is way up in the thousands.

Mr. COLE.—I move that that be stricken out. It is not shown that he is competent to testify, and for the reason it is not responsive to the question."

Mr. COLE.—He testified previously that he did not know anything about the amount or quantity of goods on hand.

(Deposition of Don H. Dickinson.)

The COURT.—Objection overruled.

Exception allowed.

(Recess.)

Mr. COLE.—(Reading cross-examination:)

"Q. Did you say you started in working for Mr. Black on the 27th of May, 1912, [131] Mr. Dickinson? A. Yes, sir.

Q. Where did you live prior to that time?

A. About six blocks away from the saloon.

Q. How long did you live in Long Beach?

A. Four years.

Q. Known Mr. Black all the time for the four years? A. Yes, sir.

Q. When did you leave Long Beach?

A. It was in the middle of last month here, some time, I don't remember the exact date.

Q. Middle of August this year? A. Yes, sir.

Q. And now living in Portland? A. Yes, sir.

Q. You are a married man, Mr. Dickinson?

A. Yes, sir.

Q. A wife and any children?

A. Wife and one child.

Q. And you lived in Long Beach from the time of the fire up until about the middle of August?

A. Yes, sir.

Q. What did you do after the fire?

A. After the fire I went and tended bar for James Hanneman.

Q. When did you start in working for him?

A. The latter part of July, I don't know the exact date. There was no excitement that day so I don't

(Deposition of Don H. Dickinson.)

remember the date.

Q. 1912? A. 1912.

Q. How long did you work for him?

A. Worked along until the last of December.

Q. December, 1912? A. Yes, sir.

Q. What have you been doing since that time, anything? A. I was down clearing land.

Q. When did you start in clearing land?

A. About the 10th of January, 1913.

Q. That is when you started in, was it, January, 1913? A. Yes, sir.

Q. How long have you worked at that?

A. Worked up until previous to the time I came to Portland.

Q. Have you ever been arrested, Mr. Dickinson?

A. Yes, sir.

Q. When was it, Mr. Dickinson?

A. It was the morning of the 27th of June, 1912, 27th of June.

Q. What was that for?

A. Well, I was accused of setting fire to the **[132]** saloon.

Q. Who did that, who arrested you?

A. Mr. Wright.

Q. Who is Mr. Wright?

A. He was prosecuting attorney then.

Q. He was prosecuting attorney for Pacific County? A. Pacific County, yes.

Q. Were you ever arrested before that?

A. No, sir.

(Deposition of Don H. Dickinson.)

Q. Now, what time did you generally leave the saloon at night?

A. Well, right there it wasn't during the busy season, I opened up between seven and half-past eight and closed up just according to how the custom was.

Q. Generally stayed there until about twelve and one?

A. I was only open one night until twelve o'clock, that was on Saturday night, I closed up shop at twelve.

Q. Saturday night you closed at twelve?

A. Yes, sir.

Q. Didn't ever stay open until one?

A. No, sir.

Q. What was your usual closing time during the week? A. All the way from half-past nine on.

Q. Varied the time? A. Yes, sir.

Q All the way from half-past nine to half-past eleven? A. Half-past eleven.

Q. How large is this saloon building where the bar was located?

A. I don't know how large it was, about twenty-five feet frontage.

Q. About twenty-five feet by how much, how deep?

A. Sixty-five or seventy feet, eighty.

Q. About twenty-five by sixty-five or seventy?

A. Yes.

Q. Does that include the whole building?

A. That includes the saloon floor, the bar floor.

Q. How many rooms were there in this building?

(Deposition of Don H. Dickinson.)

A. How is that?

Q. How many rooms were there in this building?

A. It was just the two, no three, the front and two back rooms.

Q. How large are the back rooms?

A. One that was used for a storeroom and the other was kind of a little side entrance. [133]

Q. How large was the storeroom?

A. Oh, about twelve by fifteen.

Q. How high was it, would it be eight feet high?

A. It was more than eight feet, about ten feet.

Q. It was about twelve by ten? A. Yes.

Q. The other small room was too small to use for anything except as a side entrance?

A. You could keep things in there, it was a pretty good size.

Q. What was it used for, anything specially?

A. No, sir, it did have a side entrance, but he closed that up.

Q. Now, where were the barrel goods kept, in the front room? A. In the front room, yes, sir.

Q. And where were the empty barrels kept?

A. The empty barrels, I think Bill shipped all the empty barrels before I took charge.

Q. He shipped nine while you were there, didn't he, to Astoria, nine barrels of empty bottles?

A. Empty bottles, yes, sir, they were kept in the back.

Q. These barrels of whiskey were all kept in the front room, were they? A. Yes, sir.

Q. You didn't have any barrels in the front room

(Deposition of Don H. Dickinson.)
with whiskey in at all?

A. There were two—two or three, I forget just which it was now—in the back room.

Q. They had some whiskey in? A. Yes.

Q. How many that didn't have any were there in the back room?

A. There were no empty whiskey barrels in the back.

Q. And were these barrels in front kept in a rack, or shelf somewhere?

A. On racks and two on the floor.

Q. Did you draw any goods out of them?

A. The ones on the floor?

Q. Yes.

A. No, sir, the ones on the floor weren't tapped, the ones on the rack, there were some were tapped and some that weren't.

Q. You sold most of the goods over the bar, did you? A. Yes, sir.

Q. And sold some goods by [134] the gallon, did you, to people around there? A. Yes, sir.

Q. And about how much were your daily receipts while you were there?

A. About eight or nine dollars.

Q. You didn't take in very much money?

A. No.

Q. Business was rather poor. Would they average any more than that while you were there?

A. Yes, Saturday nights when they gave dances I made pretty good.

Q. About how much would you take in then?

(Deposition of Don H. Dickinson.)

A. All the way from nineteen to twenty-five.

Q. How much money did you take in in the thirty days you were there?

A. I don't know just how much I did take in.

Q. Do you know about how much you would average? A. No.

Q. What time did you go down to the saloon in the morning?

A. All the way from half-past seven to half-past eight.

Q. And you stayed there until twelve o'clock?

A. I stayed there until twelve o'clock.

Q. And closed up to go to lunch?

A. And closed up to go to lunch.

Q. Come back about one?

A. About half-past twelve, somewhere along there, just according to the trade.

Q. Kept open until six? A. Yes, sir.

Q. And came back about seven? A. Yes.

Q. And kept open until about half-past nine to half-past eleven? A. Yes, sir.

Q. Did you have any help there? A. No.

Q. Was Mr. Black in Long Beach when he employed you? A. When he employed me?

Q. Yes. A. Yes, sir.

Q. When did he leave?

A. He left the following day I was employed.

Q. And he didn't show up in Long Beach again until after the fire?

A. He was there the Saturday night just before the fire, about the 22nd.

(Deposition of Don H. Dickinson.)

Q. What day did the fire happen?

A. It was the date of June 27th, 1912.

Q. I mean what day of the week, what day of the week did it [135] occur on?

A. Thursday or Friday.

Q. Thursday or Friday? A. Yes, sir.

Q. He was there on the preceding Saturday, the last day he was there? A. Yes, sir.

Q. How long did he stay?

A. He was there just over night, left on Sunday morning.

Q. Did he tell you where he was going?

A. He said he was going back to Portland.

Q. He said he was going back to Portland?

A. Yes.

Q. Did he tell you when he was going to return?

A. No, sir.

Q. Didn't tell you when he was going to return. Now, you didn't see him from the time, the day after he employed you until the Saturday preceding the fire? A. No, sir.

Q. And you turned the money over to his wife?

A. Yes, sir.

Q. How far did she live from the saloon?

A. Right across the street.

Q. Turned it over to her every night?

A. Yes, sir.

Q. Did she give you a receipt for it?

A. No, sir.

Q. She didn't give you any receipt?

A. No, sir.

(Deposition of Don H. Dickinson.)

Q. You turned the cash over to her?

A. Yes, sir.

Q. Did you keep a cash register? A. Yes, sir.

Q. Did that show the receipts, amount taken in?

A. Yes, sir.

Q. Did you save any record of the receipts from the cash register? A. I don't know.

Q. You didn't turn any over to Mrs. Black, did you? Did you turn any cash register receipts over to Mrs. Black? A. No, sir.

Q. Did you stop at Mrs. Black's house on the night of the fire when you went home?

A. Only went there and turned in the money and then went home.

Q. She was at home, was she? A. Yes, sir.

Q. And you went on home from there?

A. Yes, sir.

Q. What time did you get home?

A. It was about twelve o'clock at the time I got home.

Q. You received [136] a message that night that your wife was sick and for you to come home early, didn't you? A. That night?

Q. Yes, on the night of the fire. A. No, sir.

Q. Was she sick that night? A. No, sir.

Q. And you didn't tell anybody that, that your wife was sick and you had to go home early?

A. Oh, I used to go home just as early as I could because my wife wasn't feeling very well and I never would stay away any longer than I could help.

Q. Isn't it a fact you received a message that night

(Deposition of Don H. Dickinson.)

that your wife was sick, to come home as early as possible? A. No, sir.

Q. Didn't receive any such message?

A. No, sir.

Q. Was your wife up when you got home?

A. No, sir.

Q. She was in bed? A. Yes, sir.

Q. She was asleep? A. No, she was not asleep.

Q. She was awake when you got home, was she?

A. Yes.

Q. And you were both asleep when the officers came and knocked on your door? A. Yes, sir.

Q. That was about half-past two or a quarter to three?

A. About half-past two or a quarter to three.

Q. And you got up and came to the door at that time, did you? A. Yes, sir.

Q. And your wife was also asleep when they rapped on the door? A. Yes, sir.

Q. Which room were the empty cases piled up in, Mr. Dickinson? A. The empty cases?

Q. Yes, where were the empty cases piled?

A. The empty cases—I didn't see any empty cases. I used to burn up the empty cases just as fast as I would empty them.

Q. Used to burn them up in the stove?

A. Yes, sir.

Q. You didn't burn up any empty cases that were there when you came there, did you? A. No, sir.

Q. The ones you used you burned them up right along, did you? A. Yes, sir. [137]

(Deposition of Don H. Dickinson.)

Q. You are sure about that, you burned them all up, did you? A. Yes, sir.

Q. Did you have any wood there?

A. On the outside, in the back.

Q. You took a hammer and burned up the empty cases, did you?

A. Used to burn them up, used to use them for kindling wood to start the fires.

Q. How many case goods did you use while you were there?

A. I used about two cases there, but the show cases were filled when I took charge.

Q. You emptied the show cases and opened up about two more cases? A. Yes.

Q. And the goods that you sold by the gallon were drawn from the barrels, were they? A. Yes, sir.

Q. And did you sell—how many—did you sell any in larger quantities than gallons? A. No.

Q. Never sold any in larger quantities. Did you sell as much as five gallons to anybody?

A. No, sir.

Q. What was the most you ever sold?

A. One gallon.

Q. One gallon at a time? A. Yes.

Q. And did you turn over any goods to Mr. Hanneman while you were there? A. No, sir.

Q. He didn't get any at all? A. No, sir.

Q. Now, did you ship the nine barrels of empty bottles to the Astoria Bottling Works yourself?

A. Yes, sir.

Q. Was Mr. Black there the day you shipped those?

(Deposition of Don H. Dickinson.)

A. No, sir.

Q. Where did you get the empty barrels, in the back room or front room? A. Back room.

Q. Now, the bottles were in the back room, too, were they not? A. Yes.

Q. Did you take those out of empty cases—out of the empty cases?

A. No, we get all our bottled beer by the barrel and then we empty the barrels and send them back.

Q. Send them back? A. Yes.

Q. Now, you used gasoline to light the building with, for the lights? A. Yes, sir. [138]

Q. Where was that kept?

A. Under the back stairs in the back part of the saloon.

Q. And you had some cigars in your stock, did you?

A. Yes, sir.

Q. And you sold a few cigars?

A. Very few cigars.

Q. Didn't sell many cigars? A. No, sir.

Q. About how many cigars would you sell a day?

A. I don't think I sold over half a box the whole month I was there.

Q. Sold about fifty then during that month you were there? A. Yes.

Q. Did you get any liquors while you were there, receive any? A. No.

Q. Receive any cigars? A. No, sir.

Q. You didn't buy anything at all?

A. I didn't buy a thing.

Q. You didn't have any authority, I suppose, to

(Deposition of Don H. Dickinson.)

buy any goods, did you? A. No, sir.

Q. Did you tell the officers what you thought was the cause of the fire?

A. I told them I didn't know.

Q. You say that Mr. Black was there the Saturday night preceding the fire? A. Yes, sir.

Q. When did he leave, Sunday?

A. Sunday morning.

Q. Was he in the saloon Saturday night?

A. Yes, sir, he came over there and showed me what barrels to tap.

Q. Showed you which ones to use from, did he?

A. Yes, sir.

Q. And how long did he stay there?

A. He wasn't in the saloon five minutes.

Q. He didn't sell any goods himself, did he?

A. No, sir.

Q. He left the next day and told you he was going to Portland—or was it the following Monday?

A. Yes, sir.

Q. Was it Sunday or Monday he left?

A. Sunday.

Q. About what time did he leave?

A. On that six-thirty train.

Q. Do you know where Ed Phoenix is?

A. He is here in Portland some place, I don't know just where; I can find out for you.

Q. Did you count the barrels in the front room, Mr. Dickinson? A. Yes, sir.

Q. You counted them, did you? **[139]**

A. Yes, sir.

(Deposition of Don H. Dickinson.)

Q. Why did you count them?

A. I had to work around them all the time; I could not help knowing how many were there.

Q. Isn't that more of an estimate than an actual count? A. Yes, sir.

Q. More of an estimate? A. Yes, sir.

Q. You estimated that there was about twenty or twenty-one, didn't you?

A. There was about twenty-one or twenty-two, I guess.

Q. You didn't count each one, did you?

A. No, I didn't get right down and count them.

Q. You just judged there was that many there, offhand? A. Yes.

Q. And there were no barrels in the back room with liquor in them at all, was there?

A. Either two or three at the back door.

Q. Had they been tapped? A. No, sir.

Q. They hadn't been tapped at all? A. No, sir.

Q. You are positive of that, are you?

A. Yes, sir.

Q. Did you tap on them to see if they had been tapped?

A. I moved them when I had to clean up in the back part of the saloon.

Q. You don't know what was in them, do you, except that they were full?

A. Marked whiskey, that is all I can say.

Q. You don't know whether they were full of water or whiskey, do you?

A. I could not swear to that.

(Deposition of Don H. Dickinson.)

Q. You didn't tap them yourself?

A. No, sir.

Q. Now, you say that the case goods in the back room were mostly full? A. Yes, sir.

Q. About how many cases was there, would there be a dozen?

A. Oh, gee, yes, there was at least fifty cases.

Q. At least fifty? A. Yes, sir.

Q. You didn't count them, though, did you?

A. No, sir.

Q. You would not swear there would be fifty, would you?

A. I would gamble there was fifty, or more.

Q. You would estimate at least fifty? A. Yes.

Q. And were [140] they all piled up in—

A. Yes, sir.

Q. All piled in one pile?

A. Straight, took the whole side of the building in the back room.

Q. Piled up along the side, were they?

A. Yes, sir.

Q. Which side of the building were they piled on?

A. On the north side.

Q. How many rows were there?

A. Just the one row.

Q. Piled up against the wall? A. Yes, sir.

Q. How high did they go up towards the ceiling?

Q. Go about ten feet?

Q. Were they piled up nearly to the ceiling?

A. A little over half way to the ceiling.

Q. And were they piled all along the wall?

(Deposition of Don H. Dickinson.)

A. Just on the one side.

Q. Did it cover the whole side?

A. All but the spaces where the windows were.

Q. Was there any place taken out for the barrels, were the barrels also piled on that side?

A. The barrels were at the back door, right under the back steps.

Q. You mean those two barrels? A. Yes.

Q. Which you mentioned a while ago?

A. Yes, sir.

Q. Now, what was in the rest of that part of that room, empty?

A. Nothing but the barrels of beer and empty bottles.

Q. Empty barrels? A. Empty bottles, yes, sir.

Q. Was there anything, any empty barrels in there, any more than the nine, or didn't you count them? A. Oh, there were some full barrels there.

Q. Full beer barrels?

A. That I hadn't opened up yet.

Q. And these empties?

A. These empties I refilled and shipped myself.

Q. And the rest of the room was vacant, was it?

A. Yes, sir.

Q. Nothing in the rest of the room?

A. There was a stove.

Q. That was in the back room, was it?

A. Yes, sir.

Q. Was there a stove in the front room, too?

A. No, sir.

(Deposition of Don H. Dickinson.)

Q. What else was in the [141] back room besides the stove?

A. Just the stove and two chairs and the goods.

Q. How was this front room heated where the bar was?

A. From the stove, there was a big door right there going from the bar room to the back.

Q. Connected, was it? A. Yes.

Q. Now, what else was there in the back room besides these beer barrels and the stove and chairs, was there tables? A. No, sir.

Q. No tables? A. No, sir.

Q. The tables were all in the front room, were they?

A. The tables were stored away in the little room we didn't use.

Q. What else was in the little room you didn't use?

A. Nothing outside of a ladder and a few chairs.

Q. Now, you just had the one stove in the building that heated up all the rooms, did you?

A. Yes, sir.

Q. That was a wood stove? A. Yes, sir.

Q. What time did the fire go out on the night preceding the fire? A. Half-past five.

Q. Was it cold that day? A. Yes, sir.

Q. Rather cold, was it? A. Yes, sir.

Q. And when you came back at night you didn't light the fire?

A. No, because I thought I would close up early again that night.

Q. That is the reason you didn't light the fire, you

(Deposition of Don H. Dickinson.)

thought you would not be up there but a few minutes? A. Yes, sir.

Q. And I suppose the reason you stayed there some people happened to come in?

A. There was a few drummers in there that night.

Q. What time did Mr. Kayler come in?

A. He came in there I should judge between eight and nine o'clock.

Q. He stayed there until— A. Closing up time.

Q. When did you see him last the night of the fire? A. The night of the fire?

Q. Yes.

A. About three [142] blocks from the place, he was on his way home.

Q. Did he live in the same direction you did?

A. Yes, sir.

Q. Went along with you?

A. Went along until he came to his street and then he went down his street to go home and Mr. Phoenix and I went on down home.

Q. You went on to your street, did you?

A. Yes, sir.

Q. Did they wait for you while you took the money in to Mrs. Black?

A. They walked up to the corner and waited for me up by the depot.

Q. After you came out of her place you caught up with them, did you? A. Yes, sir.

Q. How many blocks is it from the saloon to your place? A. About six blocks.

Q. And you got home then by twelve o'clock?

(Deposition of Don H. Dickinson.)

A. Yes, sir.

Q. What time did you go to bed?

A. Went to bed as soon as I got home.

Q. Did you turn the light off when you went home? A. Yes, sir.

Q. It was all turned off, was it? A. Yes, sir.

Q. And the gasoline was kept outside the building under the back steps?

A. Inside the building under the back steps.

Q. Under the back steps. About how large was the entire building, Mr. Dickinson?

A. What is that?

Q. About how large is the entire building that the saloon is in? A. Inside?

Q. Well outside.

A. Well, I should judge about twenty-five by sixty-five.

Q. That would be outside measurement?

A. Yes, sir.

Q. About twenty-five foot frontage and sixty-five feet back. A. Yes, sir.

Q. One-story building? A. Two-story.

Q. Two-story building. What was upstairs?

A. Well, it was a poolroom.

Q. Was it running at the time you were there?

A. No, sir.

Q. Closed. The upstairs wasn't being used then at that time? A. No, sir. **[143]**

Q. Was anything stored up there?

A. Not to my knowledge.

Q. Did you explain to Mrs. Black that night why

(Deposition of Don H. Dickinson.)

you had quit earlier than usual, did you tell her you had quit earlier than usual on account of your wife being sick? A. No, sir.

Q. Didn't say that? A. No, sir.

Q. Did you ever tell anybody that, that you quit earlier because your wife was sick and wanted you to come home, you might have told somebody that, didn't you?

A. I believe I did one or two nights when there wasn't anything doing.

Q. Well, you might have told somebody that you quit on the night of the fire a little earlier on account of your wife being sick?

A. No, sir, not on the night of the fire, my wife wasn't sick then.

Q. How often did you go in the saloon prior to the time you started to tend bar there?

A. I used to go in to see Bill one or two nights a week."

Mr. LANGHORNE.—(Reading redirect examination:)

"Q. Mr. Dickinson, you stated that you were arrested for—or accused of setting the fire?

A. Yes, sir.

Q. When was that?

A. It was the morning of the 27th of June.

Q. Were you ever convicted? A. No, sir.

Q. Were you bound over to the Superior Court of Pacific County, Washington? A. No, sir.

Q. Weren't you permitted to go on your own recognizance? A. Yes, sir.

(Deposition of Don H. Dickinson.)

Q. Whatever became of that case?

A. I didn't hear any more about it.

Q. Were you ever informed it was dismissed by the prosecuting attorney of Pacific County?

A. No, sir, I didn't know a thing about it until you told me about it.

Q. Well, you were informed then, were you?

A. Yes, sir.

Q. When was it that you were informed that the same was [144] dismissed?

A. It was way in December.

Q. Well, tell the year.

A. I think it was December, 1912.

Q. Was the deputy prosecuting attorney, Wright, there at Long Beach the night of the fire?

A. I think he was.

Q. Was he one of the first ones that came with the marshal to yourself at the time of the fire?

A. Yes, sir.

Q. Was there an endeavor when he was there with the marshal to compel you to admit that you had set the fire?

Mr. COLE.—I object to that as not proper redirect examination."

The COURT.—Objection overruled.

Exception allowed.

Mr. LANGHORNE.—(Continuing reading:)

"Mr. BRUMBACH.—I would like to show there was a kangaroo Court there.

A. He tried to make me admit, yes, sir.

Q. How far was it from the saloon building to Mr.

(Deposition of Don H. Dickinson.)

Black's residence? A. About fifty feet.

Q. What direction?

A. Right across the track, northeast.

Q. Isn't it a fact that the burning of that saloon would endanger his rooming-house or residence?

Mr. COLE.—I object to that as not proper redirect examination."

The COURT.—Objection overruled.

Exception allowed.

Mr. LANGHORNE.—(Reading:)

"A. Yes, sir.

Q. The night or evening before the fire you paid Mrs. Black the receipts just the same as you had done every day? A. Yes, sir.

Q. Was the Black saloon a one or two story building? A. Two story.

Q. Was there any liquors or cigars or other personal property or stock stored upstairs?

A. Not to my knowledge.

Q. What time of the year is the business there of a saloon-keeper most profitable? [145]

A. Starts in about the third of July.

Q. About the third of July? A. Yes, sir.

Q. At the time you were in charge was that during the profitable summer season? A. No, sir."

Mr. COLE.—(Reading recross-examination:)

"Q. Were the cigars kept in the show case, Mr. Dickinson?

A. They were up in a little show case, yes, sir.

Q. They were all kept in the show case, were they, didn't have any stored in the back room?

(Deposition of Don H. Dickinson.)

A. Not to my knowledge.

Witness excused." [146]

[Testimony of William Black, in His Own Behalf.]

WILLIAM BLACK, plaintiff herein, having been first duly sworn, testified in his own behalf as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. State your name. A. William Black.

Q. Where is your residence?

A. Long Beach, Washington.

Q. How old are you? A. Fifty-eight.

Q. How long have you resided in the State of Washington?

A. Well, off and on for twenty-seven or twenty-eight years.

Q. Where did you come from when you came to this State? A. The first time?

Q. Yes. A. Nevada.

Q. Where were you born? A. Texas.

Q. What has been your occupation of recent years?

A. Formerly locomotive engineer for thirty years.

Q. What was your occupation in 1912?

A. Saloon-keeper.

Q. How long have you been in the saloon business?

A. About nine or ten years; something like that; I cannot say for sure.

Q. How long have you been in the saloon business in Pacific County? A. For that time.

Q. Where did you first commence running a saloon? A. Ilwaco, Washington. [147]

(Testimony of William Black.)

Q. How long did you run a saloon there?

A. Four or five years.

Q. When did you move to Long Beach?

A. I think it was in 1908.

Q. How long did you run a saloon there?

A. In Ilwaco?

Q. No, in Long Beach.

A. Probably four or five years.

Q. Well, up to the time you burned out?

A. Oh, at Long Beach, from 1908 up to the time I was burned out.

Q. What sized town is Long Beach?

A. It is a scattered town. It is a beach, bathing resort; the town is scattered.

Q. About what is the population of the town?

A. In the fall, after the bathing season?

Q. Normally.

A. Normally, oh, probably two hundred and fifty or three hundred and fifty.

Q. Tell the jury why you were running a saloon there? A. About a block above the depot.

Q. I say why were you running a saloon there?

A. To do business, to sell goods.

Q. What is Long Beach noted for?

A. For summer visitors, bathers and so on.

Q. Is it on the ocean? A. Right on the ocean.

Q. How long does this summer season last down there? A. About three months.

Q. Tell the jury whether or not vast numbers of people congregate [148] there during the summer months.

(Testimony of William Black.)

A. Yes, great numbers gather there; it is according to the times,—some years there is more and some years less. It depends upon the condition of the country, the financial condition.

Q. Tell the jury where your saloon was located in the town, as near as you can.

A. Right on the west side of the railroad track about a block north of the depot.

Q. You speak of the depot. Is there a railroad connection with Long Beach?

A. Yes, from Meglers on the Columbia River.

Q. And then where does it run to from Meglers?

A. Nahcotta. That is the northern terminus on shoal water bay.

Q. That is a railroad confined to Pacific County?

A. About thirty miles long, a narrow gauge railroad, yes.

Q. You had a policy issued to you on your stock of goods in June last year, did you?

A. I think so. I think that is the time, in June, sometime in June.

Q. Well, it is the date that the policy bears, is it?

A. What is it?

Q. It is the date that the policy bears, isn't it?

A. Yes, the same date that is on the policy.

Q. Who issued that policy of insurance to you?

A. Henry Kayler, the insurance agent at Long Beach.

Q. The insurance agent for what company?

A. For this National Insurance Company.

Q. The defendant in this action? **[149]**

(Testimony of William Black.)

A. The defendant in this action, yes, sir.

Q. Was that saloon and contents ever destroyed by fire?

A. Never was, no, sir—before—oh, I don't get your question.

Q. Was the saloon and contents destroyed by fire? A. Totally destroyed.

Q. When?

A. On the 27th of June, on the night of the 27th.

Q. Of what year? A. 1912.

Q. You heard the testimony of Mr. Madge this morning, did you? A. Yes, sir, I did.

Q. As to the character and quality of the goods you carried in your saloon at Ilwaco?

A. Yes, sir.

Q. Tell the jury how the character and quality of your goods, carried by you in your saloon at Long Beach compared with the character and quality of your goods in Ilwaco?

A. I generally bought large quantities of bonded liquors—(interrupted).

Q. Just tell the jury whether or not the character and quality of the goods you carried at Long Beach, how they compared with the goods in the saloon at Ilwaco?

A. Kept up the same standard. I bought the best liquor I could get.

Q. Tell the jury why you did that.

A. Well, I tell you, when I first started in the liquor business, I was forced into it. I loaned a man some money—I was running an engine at the

(Testimony of William Black.)
time, and I loaned $1800.00 to an old friend, but in the meantime he did not make a [150] success—he was not making a success—(interrupted).

Mr. COLE.—I object to that on the ground that it is immaterial.

The COURT.—You are not answering the question.

Mr. LANGHORNE.—Yes, that is right.

Q. Just tell the jury why you bought the character of goods you bought at Long Beach.

Mr. COLE.—I do not think that makes any difference, whether he bought it for himself or was forced to do it.

The COURT.—Objection overruled. There is an explanatory circumstance.

A. Because the class of goods I handled was not handled generally by other saloons. Half the saloons did not handle the class of liquors I handled. I wanted to handle good goods and I thought that was the only way to make a success.

Q. Did the trade that came down there in the summer have anything to do with the class of goods you bought? A. Yes, sir.

Q. In what respect?

A. After the people got to knowing the class of goods I kept—in Portland and other places, and in place of going to some other beaches, they would come down to that beach, especially the liquor drinkers, fellows that wanted a good quality of liquor, it brought lots of them down there, a good many of them.

(Testimony of William Black.)

Q. What kind of a building was this you used for a saloon building at Long Beach?

A. This was a two-story frame building.

Q. Did it have any additions to it? [151]

A. Why, it had a porch, a kind of a fancy porch on the back end.

Q. Did it communicate with any other building?

A. No other building, no, sir.

Q. Where was your residence?

A. Fifty feet across the street. I owned a hotel there.

Q. Did you have any insurance on that?

A. Not a cent.

Q. Tell the jury something about the kind and character of the hotel that you kept within fifty feet of this saloon building.

A. Well, I did not run exactly a hotel. My wife runs it. I did not run it. It is a rooming house. It had been a hotel. We just rent rooms. We do not run a hotel. It contains twenty-two rooms.

Q. How many stories? A. Two stories high.

Q. You say that was how far away?

A. Fifty feet.

Q. Was it furnished?

A. Completely furnished.

Q. Each room in it furnished?

A. Each room in it furnished, yes, sir.

Q. Was there any insurance on the contents of the hotel? A. Not a thing.

Q. Was it destroyed by fire?

A. No, sir, but they had a very hard time saving

(Testimony of William Black.)

it. It was blistered up, and broke the windows, some large windows about as large as those windows there (indicating). Blistered the sides and I had to have it painted and fixed [152] up.

Q. Now, getting into the value and extent of this stock. You heard me read the deposition this morning, did you not, of Mr. W. E. Hull of Clarke Brothers Distilling Company of Peoria, Illinois, in which Mr. Hull testified that if any liquors had been sold to you by that firm it was not direct from the distillery but through a jobber? A. Yes, sir.

Q. Did you ever buy anything from them?

A. Yes, sir.

Q. What was it? A. Two barrels of liquor.

Q. What is that paper that you hold in your hand?

A. That is a straight bill of lading, original.

Q. From what jobber did you buy?

A. Well, I bought this from the representative of this company.

Q. Where is he at? Who is he?

A. His name is Mr. Solomon.

Q. What firm did he represent?

A. A firm by the name of Hill.

Q. Clinton Hill? A. Yes, sir.

Q. Of what city? A. Seattle.

Mr. LANGHORNE.—I will offer this in evidence.

Mr. COLE.—I object to that on the ground that it is immaterial. It does not say whether that was Clarke Brothers whiskey on the bill of lading. It might have been [153] some other whiskey. If

(Testimony of William Black.)

he can testify from his own recollection that he bought it from those people, I think it would be competent, but I do not think the bill of lading is competent.

Objection overruled. Exception allowed.

Whereupon said bill of lading was admitted in evidence and marked Plaintiff's Exhibit 4 of this date.

Q. Now, you signed and swore to a proof of loss, did you, Mr. Black? A. Yes, sir, I did.

Q. I presume that is your signature (indicating)?

A. Yes, sir.

Q. Who made the proof of loss?

A. Mr. Kayler.

Q. What is the extent of your education, Mr. Black? A. Well, I can read and write.

Q. Did you ever attend school very much in your youth?

A. No, sir, I never went to school very much. What little I got, I picked up myself, but I can read and write some.

Q. On this proof of loss, there are several items which the Court has ruled, and which your counsel concedes, are not covered by the policy of insurance. At the time they were included in this proof of loss, tell the jury whether or not you believed that the policy covered those things?

Mr. COLE.—I object to that as immaterial and irrelevant. Objection overruled. Exception allowed.

A. I tell you I never had no experience of this

(Testimony of William Black.)

kind before—(interrupted).

The COURT.—Answer the question. [154]

Q. Answer the question. If you believed those things were covered by your policy? A. Yes, sir.

Q. You know what they consisted of?

A. Glasses and different things that you would use in a saloon, measures and funnels and glassware, and all that stuff, beer pumps, coils.

Q. I will ask you if you had in the saloon at the time it was burned five barrels of Old Crow whiskey?

A. Yes, sir.

Q. I will ask you if you had in the saloon at the time it was burned four barrels of Cedar Brook whiskey? A. Yes, 1903.

Q. What was the Old Crow? A. 1905.

Q. Or 1906, which? A. 1905 or 1906.

Q. Did you have three barrels of Green River whiskey?

A. Three barrels of Green River whiskey, 1902.

Q. Did you have three barrels of Penwick Rye?

A. Three barrels of Penwick Rye, 1904.

Q. Did you have a barrel of Old Crow of a different year?

A. I had a barrel of Old Crow 1899, one hundred and twenty proof.

Q. One barrel of Fox Mountain?

A. One barrel of Fox Mountain, 1896, one hundred and twenty-seven proof.

Q. Two barrels of McBrayer Single Stamp whiskey? A. Yes, sir, I did.

Q. Did you have one barrel of Wicklow whiskey?

(Testimony of William Black.)

[155] A. Yes, I did.

Q. Did you have one barrel of California port wine? A. Yes, one barrel of port wine.

Q. In answer to a question you spoke of one hundred and twenty proof. What do you mean by that?

A. As the liquor ages, and the fusel-oil evaporates or leaves it, the proof runs up. The proof and the age is what makes the quality of the whiskey.

Q. It would take me all of the rest of the day to go over this item by item, so I will ask you the general question. Did you have all of these articles in the saloon at the time of its destruction by fire?

A. At the time the invoice was taken, I had all them goods (indicating), he might have sold a few of them when I went away, after I got sick and went away to Portland.

Q. Was any of that ever removed from the saloon after the invoice was taken?

A. Not to my knowledge.

Q. Did you have any articles in the saloon that were not listed in the proof of loss? A. Yes, sir.

Q. Where were they? A. They were upstairs.

Q. What did they consist of?

A. Well, there was a fellow that was sold out at a sheriff's sale by the name of J. B. Knight, and I bought the stock.

Q. What did you pay for it? A. $350.00.

Q. Did you receive any paper from the sheriff?

A. Yes, a sheriff's bill of sale. [156]

Q. Look at that and state whether that is the paper you received (indicating).

(Testimony of William Black.)

A. Yes, that is it.

Q. Was there a lot of cigars that were contained in the purchase made by you from the sheriff?

A. Yes, sir.

Mr. COLE.—I object to that on the ground that he is leading the witness and move that the answer be stricken.

Objection sustained.

Q. State what was in the purchase made by you at the time of the sheriff's sale.

A. What it consisted of?

Q. Oh, yes, generally.

A. Well, the stock that is usually in a saloon, whiskeys, wines, gin, cigars—(interrupted).

Q. You spoke of cigars. About how many cigars did you get?

A. Well, I do not remember how many cigars. I know there was a number of cigars.

Q. Well, about?

A. Perhaps seven or eight hundred, probably.

Q. Did you put those upstairs or downstairs?

A. No, sir, I put them with the other cigars in my stock.

Q. That is what I am driving at. You put them down among—(interrupted).

A. I put them down among the other cigars.

Q. I wish you would tell the jury about what was the value of the goods you lost by fire, about how much was the value of the goods you lost by fire, not including these articles that the Court holds are not covered by the policy of insurance? [157]

(Testimony of William Black.)

Mr. COLE.—I object to that. It is not shown that he is competent or familiar with that.

Objection overruled. Exception allowed.

Q. Just answer the question.

A. Do you mean the stock?

Q. Yes.

A. The liquor stock and the cigars?

Q. Yes.

A. I think I lost between eight or nine thousand dollars.

Mr. COLE.—I move that this testimony in regard to the value of this stock be stricken out on the ground that it is not shown that that is the market value of the property. He is only entitled to recover the market value of it. That is not shown to be the market value of it. That is his opinion, that testimony, in regard to that stock, and I move that it be stricken out.

The COURT.—Motion granted. You will have to confine it to the market value of the goods lost.

Q. What was the market value of the goods lost by you in this fire on June 27th, 1912?

Mr. COLE.—I object to that. It is not shown that he is qualified and familiar with the market value.

Objection overruled. Exception allowed.

A. I had some whiskey that was not on the market.

Q. Just answer the question, and we will talk about that afterwards. Just state what in your opinion was the market value of the goods lost by you in the fire on June 27th, 1912?

(Testimony of William Black.)

A. Well, I consider that I lost over eight thousand dollars, the market value would be eight thousand dollars and more. [158]

Q. What I mean is what could you have sold that stock of goods for, on the open market, what would have been its value, its fair price, a fair price from somebody that wanted to buy and did not have to buy, to someone that wanted to sell but did not have to sell, now, what would be a fair, honest, market price for that stock of goods as it existed there?

A. Eight thousand dollars.

Q. Did some barrels of whiskey come in there just prior to the fire? A. Yes, sir.

Q. How many?

A. Two, right prior to the fire, about a month or two before the fire.

Cross-examination.

(By Mr. COLE.)

Q. You did not make any claim for this that just came in, you did not put that in your proof of loss, this that came in just before the fire?

A. I do not remember whether that was in the proof of loss or not. They were lying down on the floor. There was not room to put them up on the racks.

Q. You moved over from Ilwaco about the 1st of July, 1908, did you not? A. What is that?

Q. You moved over from Ilwaco about the 1st of July, 1908, did you not? A. Well, about that time.

Q. How long did you live in Ilwaco?

A. Several years. [159]

(Testimony of William Black.)

Q. You were refused a license in Ilwaco, were you not, on account of the character of place you were running?

Mr. LANGHORNE.—I object to that on the ground that it is immaterial.

Mr. COLE.—I think it is proper cross-examination; it would affect his credibility.

The COURT.—The objection is sustained. If you want to show he has been convicted of a felony, that would affect his credibility, but you cannot rake and scrape his life fore and aft about what he has done or has not done.

The WITNESS.—I have been in jail in Old Mexico. I can tell you about that.

Q. Were you convicted in the Dalles?

A. No, sir; I was never convicted of a crime in this country, and I have never been in jail in this country.

Q. Were you not in jail when you were arrested for shooting a man over at Ilwaco?

A. No, sir; I was arrested, but—(interrupted).

Q. You were not in jail? A. No, sir.

Q. What time did your license expire at Long Beach, Mr. Black?

A. I think it was in July, 1912; I would not be sure.

Q. It was in July, 1912? A. Yes, sir.

Q. And you knew, of course, that there had been a remonstrance filed by the citizens of Long Beach against its being continued?

A. I did not know anything about that; I knew

(Testimony of William Black.)

there were parties after me there. **[160]**

Q. You knew that one of the people was circulating a petition before your license expired? To have it refused July 1st?

A. There had been two of them, different years.

Q. Were you not given to understand by the commissioners that there was no need of your applying again?

A. There was no objections to my receiving a license; I was never informed that it would be refused.

Q. There was a remonstrance filed against it?

A. Not that I know of.

Q. You were never told about it? A. No, sir.

Q. You do not know whether there was or not?

A. I never heard of it if it was.

Q. You would not swear there was not?

A. I never heard of it.

Q. Why did you move from Ilwaco to Long Beach?

A. For business.

Q. How is that? A. More business.

Q. You thought you would get more business. You moved some goods from Ilwaco to Long Beach?

A. Yes, sir.

Q. You moved these three barrels of Green River whiskey that you make claim for?

A. I moved five barrels of Green River.

Q. You moved some other whiskey too?

A. Five barrels of Penwick Rye.

Q. That is the liquor you bought from Blumaer & Hoch in Portland?

(Testimony of William Black.)

A. That came right direct from the distillery. **[161]**

Q. That cost you about a hundred dollars a barrel? A. Over that.

Q. In 1909? A. 1909?

Q. Yes.

A. No, sir; I never bought it from Blumaer & Hoch. I bought that before the earthquake.

Q. When Blumaer & Hoch testified that they sold you five barrels of liquor in 1909, they were mistaken, they were wrong?

A. I thought you had reference to five barrels of liquor in 1899.

Q. I mean five barrels in 1909?

A. That was at Long Beach.

Q. And you paid a hundred dollars a barrel for it?

A. I do not know exactly what I did pay.

Q. You heard Blumaer & Hoch's testimony that that was about what it was, about a hundred dollars per barrel, five hundred dollars for five barrels?

Mr. LANGHORNE.—That does not include freight or warehouse charges from Louisville, Kentucky.

Q. Freight would not be very—(interrupted).

A. Seventeen and a half cents a gallon from Louisville, Kentucky.

Q. You paid two dollars and sixty-five cents a gallon to Blumaer & Hoch, and the freight, seventeen and a half cents more, that would be about two dollars and eighty-three cents a gallon?

A. I guess so.

(Testimony of William Black.)

Q. Do you say that these barrels that cost you a hundred [162] dollars are now worth two hundred dollars a barrel, at the time of the fire?

A. I have aged that whiskey. I have not sold any of that whiskey.

Q. You bought it in 1909 and it was destroyed in 1912, do you mean to state to this jury that that whiskey doubled in value from the time you bought it until it was destroyed?

A. Well, it cost me over a hundred dollars a barrel.

Q. It didn't cost you much more? A. Yes, sir.

Q. It didn't cost you a hundred and ten dollars a barrel? A. Yes; and then some.

Q. How much?

A. Freight—(interrupted).

Q. The freight was sixteen cents a gallon?

A. Seventeen and a half cents a gallon.

Q. How many gallons in a barrel?

A. Forty-six or forty-seven.

Q. How much did you pay for it if you paid more than a hundred and ten dollars a barrel?

A. You must remember that that whiskey aged in the evaporation which took place—(interrupted).

Q. I am not talking about age. You contend that it would increase from a hundred and five dollars a barrel to two hundred dollars a barrel in three years?

A. It cost more than a hundred and five dollars a barrel.

Q. How much more than a hundred and five dollars a barrel? A. I never figured up.

Q. Do you mean to say that the cost you paid

(Testimony of William Black.)

Blumaer & Hoch, [163] plus freight from Louisville, Kentucky, would be more than a hundred and five dollars? A. That is what I valued it at.

Q. You do not know that it was worth two hundred dollars a barrel at the time it was destroyed?

A. I could have got that for it.

Q. Where? A. I could have sold it.

Q. You bought it in 1909?

A. 1908 or 1909, I do not remember.

Q. You shipped over the Ilwaco railroad from Ilwaco to Long Beach? A. Yes, sir.

Q. And you shipped all of your liquors that you had in Ilwaco over there, didn't you?

A. I had some hauled by wagon. The car would not hold it all, and I—(interrupted).

Q. How much did you haul by wagon?

A. Oh, probably—I think it was six barrels—I disremember now. I think it was six barrels.

Q. And how many did you have in the car?

A. Well, I had the car filled with case goods and barrels.

Q. How many cases in the car, do you remember?

A. No, sir; I do not.

Q. Do you mean to tell this jury that you had more goods than you could put into a car?

A. I had more goods than I could put into that car, yes, sir; that is what I mean to tell you.

Q. Who hauled them over for you?

A. Some teamster there. I disremember now who it was. [164]

Q. How did you send the liquor already described, by car or team?

(Testimony of William Black.)

A. I wish to state to the jury that I had different ages than Old Crow.

Q. You had the five barrels you had from Blumaer & Hoch and one other barrel?

A. That was 1895, I think—well, it was 1895, and then I had—(interrupted).

Q. How many barrels did you have of liquor?

A. I had some 1905 and then I had some 1889 of liquor.

Q. You had six barrels then, did you?

A. Yes, sir.

The COURT.—1889 or 1899?

A. I had 1899 and 1905 or 1906 liquor, I do not remember which.

Q. Did you send this liquor over there by team or railroad? A. This liquor?

Q. Yes.

A. Came by train; came with the rest of my goods.

Q. All of it came by train? Did you send Green River by train?

A. Yes, and the Penwick Rye by train.

Q. And you sent your case goods by train?

A. Yes, sir.

Q. That was the Ilwaco Railroad Company?

A. The Ilwaco Railroad Company.

Q. That was in the year 1908? A. Yes, sir.

Q. And you made affidavit in your proof of loss that these [165] barrels were untapped, these five barrels—four barrels of liquor?

A. Yes, there was four barrels untapped and one I tapped.

(Testimony of William Black.)

Q. And three barrels of Penwick Rye you swear were untapped? A. Yes, sir.

Q. In your proof of loss you claim one barrel of Box Mountain whiskey, not tapped, four hundred dollars. Where did you buy that barrel?

A. I bought it from Brown, Foreman & Company.

Q. What did that cost you?

A. I think that was six or seven and a half a gallon.

Q. You heard Brown & Foreman's testimony as to what you paid for it? A. Yes, sir.

Q. How many gallons was there in that barrel?

A. I do not remember.

Q. Is it not a fact that you did not pay only a hundred and fifty dollars for that barrel of whiskey or about that much?

A. I paid more than that for it.

Q. Is it not a fact that you paid less than two hundred dollars for that barrel?

A. I was offered ten dollars a gallon for that whiskey.

Q. What year did you buy that whiskey? Didn't you buy that in 1911? A. I think I did.

Q. Well, that was not very old?

A. Why, certainly it was.

Q. It was old when you got it?

A. It was old when I got it. [166]

Q. How did you happen to get it so cheap?

A. A friend of mine got it for me—they found that afterwards; they found it in their warehouse and did not know that they had it.

(Testimony of William Black.)

Q. Brown & Foreman Company friends of yours?

A. They are; yes, sir.

Q. They are in the wholesale liquor business?

A. They are distillers.

Q. Who is your friend in that company?

A. Why, their agent.

Q. What is his name? A. His name is Walton.

Q. Do you mean to tell this jury that barrel of liquor you bought in 1911 for less than two hundred dollars a barrel, was worth four hundred dollars?

A. I tell you, gentlemen, I could have put a big price on that liquor. That was a rare piece of goods. I would sell no one a bottle of it. Now, that barrel was tapped; it was not untapped, but it had only been tapped a little while, and there was very few people that ever took a drink out of it. I sold it for twenty-five cents a drink.

Q. Who were some of the people you sold out of it?

A. Very few.

Q. If it was not untapped, why did you swear in your proof that it was untapped?

A. Well, I had just tapped it.

Q. Is it not a fact that you had been selling out of it ever since you got it? A. No, sir. [167]

Q. Did you ever sell Mr. Peter Waller any of it?

A. No, sir; I do not believe that Mr. Waller ever bought that kind of liquor.

Q. Is it not a fact that this Penwick Rye that you bought from Blumaer & Hoch you paid them a hundred dollars a barrel for it?

A. It cost over a hundred dollars a barrel.

(Testimony of William Black.)

Q. Not more than a few cents.

A. I had that a number of years.

Q. When Blumaer & Hoch say that they sold you five barrels for five hundred dollars, are they stating the truth or not?

A. If they said so that is all right.

Q. And about the Penwick Rye, when they testify that they sold you that for a hundred dollars, are they right or wrong?

A. If they said I paid a hundred dollars for it, that is what I paid for it.

Q. The price they testify to is the price you paid for it? A. I guess it is, less freight.

Q. Do you contend that this whiskey you bought for a hundred dollars a barrel in 1907 was worth at the time it was destroyed two hundred and fifty dollars a barrel? A. Yes, sir, I do.

Q. You want the jury to believe that, do you?

A. Well, I cannot help it. I aged that whiskey and I considered it was worth that much money. It was not for sale. You could not buy it from the distillery; it was not sold in bulk any more. It was all bottled in bond and I had been offered seven dollars a gallon for it [168] right there in the bar-room by William Locke, a jobber.

Q. He is a friend of yours?

A. No more than any other salesman or traveling man.

Q. Did you count the number of cases in this proof of loss?

A. When I took the invoice, we counted every-

(Testimony of William Black.)
thing, that is, downstairs.

Q. You counted everything and Mr. Kayler took it down? A. Yes, sir.

Q. Now, I would like to ask you where these case goods were kept?

A. The bulk whiskey was right in the front bar on the right, with the exception of three barrels untapped. That was in the back room.

Q. Three barrels, untapped, in the back room?

A. Three barrels, untapped, in the back room under the stairway. And these case goods were piled up in the back room. There is an archway there,—(interrupted).

Q. On the north side? A. Yes, sir.

Q. Mr. Dickinson testified right after that that they were piled up on the north side. How large was a case of goods, about two by two and a half feet by eighteen inches?

A. Something like that, yes, sir. About fourteen inches high. They hold a dozen of those goods.

Q. Did you count the number of cases you made claim for here in your proof? A. Yes, sir.

Q. How many?

A. There was a hundred and fifty-seven cases piled up in that [169] room.

Q. On the north side? A. Yes, sir.

Q. You want the jury to believe that?

A. Yes, sir, I do. And there were three large show cases; one case as you came into that building, a black walnut case containing nothing but imported bottled goods, and there was two other large cases

(Testimony of William Black.)

full, twelve cases to a case, making a total of a hundred and ninety-three cases.

Q. Do you know how many cases you bought since you were in business including in Ilwaco?

A. I never kept track. One brand of liquor, there would be a run on it, and then they would quit and they would want some other class.

Q. You left Long Beach on the 24th of June, did you? A. On a Monday.

Q. What time in the morning?

A. On the six-thirty train.

Q. Where did you go? A. Astoria.

Q. What time did you get to Astoria?

A. On the arrival of the boat.

Q. About what time of the day was that?

A. Probably I arrived in Astoria at ten o'clock.

Q. Ten o'clock in the forenoon? A. Yes, sir.

Q. And you came to Long Beach on the Saturday preceding, did you not?

A. On a Friday; Friday evening.

Q. Mr. Dickinson was wrong when he said Saturday? **[170]**

A. He made a mistake; I came there Friday evening.

Q. Where did you come from?

A. I came from Portland.

Q. Had you been in Portland ever since you hired Mr. Dickinson? A. Yes, sir.

Q. And you went back to Long Beach?

A. Yes, sir.

Q. And when you left Long Beach on the morning

(Testimony of William Black.)

of the 24th, that Monday morning, did you tell Mr. Dickinson you were going to Portland?

A. I did not see Mr. Dickinson—I saw him Saturday and on Sunday he was home with his family.

Q. Did you have any talk with him as to where you were going?

A. I do not remember whether I did or not; I told him—(interrupted).

Q. Did you tell him you were going to Portland?

A. I told him I was going away; that I was going back.

Q. When he testified that you told him you were going to Portland, he was wrong?

A. I do not remember whether I told him or not. I do not remember with regard to that.

Q. You stayed at the Parker House in Astoria?

A. Yes, sir.

Q. Did you tell Parker that you just came from Seaside?

A. No, sir, I never told Mr. Parker anything of the kind.

Q. He is wrong?

A. Mr. Parker invited me to go down to Seaside the day after I got there, the next day after I got there.

Q. Did you leave Astoria from the time you got over there on [171] Monday morning?

A. Only to go to Seaside.

Q. What time did you go to Seaside?

A. I think I went to Seaside on the twenty-sixth.

Q. That was the day of the fire. What time did

(Testimony of William Black.)

you go to Seaside?

A. I went down in the morning.

Q. What time did you get back?

A. In the evening; I arrived in Astoria about ten or eleven.

Q. Did you cross over to Ilwaco at any time while you were in Astoria?

A. When I came there that Friday.

Q. I mean after you left Long Beach on Monday?

A. No, sir.

Q. Is it not a fact that you crossed the river to Ilwaco and talked to Mr. Robert, to Mr. Rogers, who owns the mill at Ilwaco and Mr. Pattenay?

A. It is a fact that Friday evening when I came across on the launch about six or half-past six in the evening, and when I came up to the dock I met Mr. Pattenay at the sawmill and Mr. Rogers and I talked with them; yes, sir.

Q. That was on Friday evening?

A. That was on Friday evening, yes, sir.

Q. You are sure about that, are you?

A. Yes, sir, I am sure about that.

Q. What did you say to them?

A. We were talking in a general way.

Q. How long did you stay in Ilwaco?

A. Why, I left there. I talked to them and I left there.

Q. Did you take a train to Long Beach? [172]

A. Oh, no.

Q. How did you get to Long Beach?

A. I walked up.

(Testimony of William Black.)

Q. What time did you get into Long Beach?

A. Oh, it is about four miles up there. I guess I walked it in probably an hour and a half or so.

Q. What time did you see Mr. Pattenay?

A. About half-past six, I guess.

Q. How far did you say it is from Ilwaco to Long Beach? A. About four miles, I think, by road.

Q. Is it not further than that?

A. I do not think so; about four miles.

Q. Did you go down to the saloon Friday night?

A. I do not remember whether I did or not.

Q. You would not say whether you did or not?

A. No, sir.

Q. Do you know how late Mr. Dickinson kept open Friday night? A. I do not.

Q. Did he give you the money when he came home that night? A. Yes, sir.

Q. Gave you the money personally; did not give it to your wife?

A. No, sir, I was there and he gave it to me.

Mr. LANGHORNE.—What week are you talking about?

Mr. COLE.—This was on Friday preceding the fire. You said Mr. Dickinson gave you the money that night?

A. Yes, sir.

Q. When Mr. Dickinson testified, as you heard this afternoon, that he did not see you until Saturday he was wrong? **[173]**

A. It may have been Saturday. I do not testify

(Testimony of William Black.)

positively I saw him Friday night. I do not remember.

Q. Well, he gave you the money.

A. He gave it to me Saturday night, one night while I was there; he gave it to me, I think, Saturday night. I do not think I saw him Friday night.

Q. You did not see him the Friday night when he gave the money to your wife?

A. Probably did; I do not believe I saw him Friday night.

Q. What kind of a conversation did you have with Mr. Pattenay that evening crossing the river? Did you tell him you were going home? A. Yes, sir.

Q. What did you have in your hand?

A. Satchel.

Q. You told him you were going back to Long Beach? A. Yes, sir.

Q. Did you tell him you were going back to Astoria again?

A. I do not remember the conversation I had with him.

Q. You did not go down the main street?

A. Back street.

Q. And past the mill?

A. I took the back tracks; they were after me.

Q. You knew there was a warrant out for you?

A. You bet I did.

Q. Do you know who had it?

A. Well, I surmised who had it.

(Witness excused temporarily.)

(Court adjourned to 10 A. M., Oct. 22, 1913.)

[174]

(Testimony of William Black.)

WILLIAM BLACK, cross-examination continued.

(By Mr. COLE.)

Q. Did you do very much business down there, Mr. Black? A. I have, considerable.

Q. How much money did you take in per day, about?

A. Well, of course, the business fluctuated, in the summer it was pretty good, and the balance of the year, why, it did not amount to much.

Q. In the summer months when the tourists went down there, it was good business? A. Yes, sir.

Q. You didn't take in much during the winter?

A. No—(interrupted).

Q. How much would you take in?

A. Five or six or seven or eight dollars a day.

Q. Would not be three hundred dollars a month, would it?

A. Oh, it might run up to that sometimes.

Q. Would it average that much, do you think?

A. No, sir, it would not.

Q. About how much would you take in during the year? A. Well, I could not tell.

Q. Can you estimate it? A. No, sir.

Q. How is that? A. No, sir.

Q. You could not estimate it. You kept a cash register, did you? A. Yes, sir.

Q. You had a tape on the cash register, did you?

A. Yes, but I never put a tape on the register, never used it. **[175]**

Q. Did you take in $500 a year? A. Yes, sir,.

Q. 1,000? A. Yes, sir.

(Testimony of William Black.)

Q. 2,000?

A. Probably $1,700 or $1,800 a year, probably more.

Q. Did you take in $2,000? A. Probably so.

Q. 3,000? A. I do not think so.

Q. Did you take in 4,000? A. No, sir.

Q. You are sure about that, are you?

A. Yes, sir.

Q. About how much a day would you take in in the summer months?

A. $25 or $30 a day, some days.

Q. Around about $800 or $1,000 a month during the summer months, the hot weather?

A. I think the most I ever took in there was $800 in one month.

Q. What month was that?

A. That was in the month of August.

Q. You went over there in July, 1908?

A. I believe that was the time, yes, sir.

Q. That was your best year, 1908?

A. That was a very good year.

Q. How about 1909? A. It was not so good.

Q. 1910? [176] A. Not very good.

Q. 1911? A. Pretty bad.

Q. Business kept getting worse, did it, from the time you moved over there?

A. As these other beaches opened up, there was not so many people came over there.

Q. You think around $3,000 a year is what you sold?

A. I do not think I ever took in $3,000 a year.

(Testimony of William Black.)

Q. You do not think you did?

A. No, sir, I am sure of it.

Q. How much did you take in then?

A. I might have possibly taken in between $1,500 and $1,800 a year, something like that.

Q. You think it was under $2,000?

A. I think so. I never figured up; I never kept books; I could not keep them if I wanted to.

Q. You remember after this fire occurred, you remember telling the insurance representatives that you took in $300 a month during the winter months?

A. I do not remember.

Q. You say you did not?

A. I did not say I did because I never took in $300 a month during the winter.

Q. Where did you make your deposits?

A. The First National Bank of Astoria.

Q. The money you took in at the saloon, you deposited that money over there?

A. I had other business besides the saloon.

Q. What business? [177]

A. Different kinds, oyster business.

Q. Did you deposit all of your saloon money there?

A. No, sir, not all of it.

Q. Didn't you tell the representative of the company that they could go to the First National Bank in Astoria and see how much money you took in?

A. At their solicitation, if you want me, I will explain it.

Q. Go ahead.

A. The adjuster and another man came in my

(Testimony of William Black.)

place in January, the first time I ever saw him.

Q. 1913?

A. 1913, yes, sir. And they talked to me and wanted to know what I took in and so on and they wanted to know if I had any bills, and I showed them a box I had taken out of my safe of charred bills and checks and different things that I had in there, and they looked at them, and before they went away I told them I was willing to give them all the information I could, and they asked me if I would give them permission to go through my bank account in Astoria—asked me where I done business, and I told them Astoria, and they asked me for permission to go through my bank account in Astoria and I told them I would and I told them to write out an order and I would sign it, which they did. Now, that is the case exactly, that was the conversation.

Q. Didn't they ask you about how much your sales were?

A. I told them I never kept any books and could not give them—(interrupted).

Q. You told them you did a big business?

A. No, sir, I told them in the summer months business was **[178]** good but did not do much during the winter months.

Q. Didn't you tell them that it was not much during the winter months and you did not take in over $300 a month?

A. I do not remember telling them anything of the kind because there was days that I did not take in $1.50.

(Testimony of William Black.)

Q. You would not swear that you did not tell these representatives that?

A. I am sure I did not, because I never took in that amount of money in the winter months.

Q. When did business begin to pick up?

A. It would look up a little in June, when the people would commence to come down there to open up their summer cottages and so on.

Q. You do not agree with your bartender on that proposition. He said business did not begin to pick up until after the 4th of July.

A. Oh, yes, that is possible, but people commenced to come down there in June. It did not amount to much, but it was better than the rest of the year.

Q. Do you know how much money he took in while you were gone?

A. I believe that he took in about $135 while I was gone, $135 and something, I think that was the amount that he turned over to Mrs. Black.

Q. You are not positive?

A. I never put it down. I think that was the amount.

Q. You were gone about a month?

A. Yes, about a month.

Q. You heard his testimony that he took in about $8 or $10 per day and on Saturdays about $20?

A. If there was a dance there on Saturday—(interrupted). **[179]**

Q. Did you take in any more on Saturday than on week days? A. If there was a dance he would.

(Testimony of William Black.)

Q. Did you hear him testify that he took in about $300 that month?

Mr. LANGHORNE.—I object to counsel trying to get this witness to pass upon the credibility of other witnesses.

Mr. COLE.—The bartender says he took in $300 a month and he claims he only turned in about $135.

The COURT.—It is preliminary. It is simply to refresh his memory, concerning somebody else's statement.

Mr. LANGHORNE.—He is asking what somebody else swore.

Objection overruled. Exception allowed.

Q. This statement of your bank deposit from January 1st, 1912,—this is it, isn't it? (Indicating.)

A. I do not know anything about that; I had other business besides the saloon business. I did not make my money out of the saloon business; that did not keep me.

Q. I am not asking you about that. I am asking you if those were your deposit slips?

A. I guess that is right. I have done business with them about fifteen years.

Q. It appears here that up to the time of the fire you deposited about $300 a month more than you did after the fire. Don't you think then that probably was about what you took in?

A. I might explain that to you. I loaned a party some money and another party who is present here right now, bought a piece of property from me, and he gave me a mortgage, and I sold that mortgage to

(Testimony of William Black.)

a woman by the name of Mrs. Culberson. **[180]**

Q. What has that got to do with it?

A. Well, that money went to the bank.

Q. How much was that?

A. Oh, five or six hundred dollars, something like that. I did not have it all at the bank, I kept some of it. I keep money around in my pockets. My pockets are not empty all the time. I had to have some money; I was doing different business.

Q. Will you explain how it is you deposited about $300 a month more before the fire than afterwards? Isn't it a fact that you took in that much money out of the saloon?

A. You must remember my wife ran a lodging-house.

Q. She ran it when the saloon was running?

A. There was a good many people took beds that did not drink whiskey, and then we had some rents coming in too.

Mr. COLE.—I would like to offer this in evidence.

Mr. LANGHORNE.—Without any proof of who made it or what it is? I do not know who made this, or what it is, or what it purports to be.

The COURT.—I understood the witness qualified it when he said he supposed it was all right.

Mr. LANGHORNE.—This purports to be a statement of the bank, the First National Bank of Astoria—(interrupted).

The WITNESS.—I wish to state that my wife has $95 a month coming in from rentals.

Q. You deposited that? A. Yes, sir.

(Testimony of William Black.)

Q. Before the fire and after?

A. Before the fire and after.

Mr. LANGHORNE.—May I ask your purpose in offering this in [181] evidence?

Mr. COLE.—I want to show what his sales were.

Mr. LANGHORNE.—That they were about $300 a month?

Mr. COLE.—Yes, sir.

Mr. LANGHORNE.—All right, put it in evidence. I have no objections, if that is what you want to prove.

Whereupon said statement was admitted in evidence and marked Defendant's Exhibit "B" of this date.

Q. You took in about $300 a month during the winter months—(interrupted).

A. I told you I did not do any such a thing. I never told you that nor any other amount.

Q. You do not agree with the bank statement?

A. The bank never made no statement that I made that money in the saloon business.

Q. Explain how you got this money.

A. I am trying to explain that I had other sources of income. I loaned money to people.

Q. Explain how your income dropped off after this fire.

A. My income has not dropped off after this fire.

Q. How do your deposits drop off after the fire?

A. I was doing business—(interrupted).

Q. I am asking you to explain why your deposits dropped off after the fire, after you quit selling

(Testimony of William Black.)

liquor. If you were not selling $300 worth a month, how did your bank deposits happen to fall off?

A. I did not deposit all of my money in the bank. I was in other business and I had to make a living at something else. I got no interest for that money in the bank; **[182]** they paid no interest. That is why it dropped off, probably, then of course if I did not have no saloon money, I did not send that in. I had to make a living some other way.

Q. Do you know how much a barrel of whiskey will exaporate in six years? A. Yes, sir.

Q. How much?

A. It all depends upon the condition of the warehouse and how it is kept, the temperature and everything.

Q. Is not there a standard amount?

A. The Government allows four and a half gallons in eight years, but it will run away over. I have got whiskey that evaporated fourteen and fifteen gallons.

Q. In eight years?

A. Yes, and I have paid a tax on it.

Q. The Government allows how much?

A. I think four and a half gallons.

Q. You are not sure?

A. I am not sure, it is something like that; I would not be positive.

Q. Is it not a fact that liquor will evaporate about thirteen and a half gallons in six years in wooden barrels?

A. More, sometimes, it all depends on conditions.

(Testimony of William Black.)

Q. That is the standard average?

A. There is no standard—now, I want to explain to you; you take liquor in a store right here on Pacific Avenue in a building that has a temperature, it would not evaporate, the evaporation would be very small per year. The greatest evaporation is the first year, and then it **[183]** decreases as it gets older.

Q. Then you do not know the amount allowed by wholesalers for evaporation, the standard amount?

A. The Government evaporation, I think, they allow about four and a half gallons.

Q. You swear to that?

A. No, I do not know. I am not positive about it. I think it is about that; I have read it but I am not—(interrupted).

Q. You are not familiar with those figures at all. Do you know what the market price of 1906 Old Crow was in June, 1912? The market price?

Mr. LANGHORNE.—Wholesale, distillery or where?

Mr. COLE.—I am asking the market price being asked by wholesalers for Old Crow in June, 1912.

The WITNESS.—I don't know.

Q. Do you know what the market price of McBryer's was in June, 1912? A. No, sir, I do not.

Q. Penwick Rye? A. I do not.

Q. Green River? A. You could not buy it.

Q. You would swear that you could not?

A. Yes, you could not buy it.

Q. In your proof of loss, you made a claim for a barrel of Fox Mountain Whiskey. I will ask you if

(Testimony of William Black.)

you bought that from Brown-Foreman & Company?

A. Yes, sir.

Q. And you paid for that whiskey $162.43? That was the [184] testimony of the company?

A. I guess so; I guess that is it.

Q. You claim now $400 for it, and you bought that liquor in 1911?

A. I was offered $10 a gallon for that whiskey. It was a pick-up.

Q. I am not asking you that. I am asking you if you claim $400 for liquor that you bought in 1911?

A. Yes, but—(interrupted).

Q. On your proof of loss, you asked $400 for that barrel of liquor? A. Yes, sir.

Q. And you tapped it and took some out of it?

A. No liquor sold out of that barrel. I had given some—let some people taste it, but it was over one hundred and twenty proof.

Q. You will swear that you never sold any whiskey out of that barrel?

A. Never sold any of that out of that barrel—(interrupted).

Q. Didn't you testify yesterday you sold some at twenty-five cents a drink?

A. I was going to sell that at twenty-five cents a drink.

Q. Is not that what you testified to yesterday?

A. There was a few people tasted that whiskey; I never sold any of that whiskey.

Q. You made the claim to the insurance company for three barrels of Green River and three barrels

(Testimony of William Black.)

of Penwick Rye, untapped? A. Yes, sir. [185]

Q. You heard Mr. Madge state on the stand yesterday that when he inspected your liquor that it was all tapped, and you had this Green River and this rye on hand when he inspected your place?

A. I never heard Mr. Madge say that the Penwick Rye and the Green River was all tapped.

Q. You heard him say it was all tapped?

The COURT.—He has answered that question. There is no use repeating questions.

The WITNESS.—I never heard him say so.

Q. You did not hear him say these particular brands were tapped?

A. I have made a specialty of handling Green River for years.

Q. Is it not a fact that you told the insurance company when they asked you to produce papers, invoices and bills, that your bills were all destroyed in the fire? A. Yes, sir.

Q. And they also asked you to produce your bills of purchase, inventory and invoices, and certified copies if you had lost the originals?

A. I furnished the insurance company with what I had.

Q. Answer the question. They asked you to furnish those bills and invoices, and if you did not have them to get certified copies of the bills of purchase.

A. I do not remember the letter. I know I gave them all I had, the best I knew of, what I could find.

Q. You told them that your papers were all burned up in the safe? A. Yes, sir.

(Testimony of William Black.)

Q. What was this bundle of papers you were telling about [186] taking out of the safe a while ago?

A. They were all charred. The adjuster saw them, most of them.

Q. Now, you testified yesterday that you had Mr. Kayler write your letters about the sale you were negotiating. Did he ever write any letters for you?

A. He has done lots of business for me.

Q. You wrote all of the letters to the general agents of the insurance company at Portland about this loss, didn't you? A. I guess so.

Q. And you wrote them yourself in your own handwriting? A. Yes, sir.

Q. This man Mack was a friend of yours also?

A. Yes, I was acquainted with him off and on for a number of years.

Q. What business was he in? A. Teamster.

Q. Is he not driving a team for a concern in Portland? A. I think he owns his own outfit.

Q. You wrote this letter to Davenport, Dooley & Company, July 3d, the date it bears?

A. I met with the loss on June 27th.

Mr. LANGHORNE.—You need not read the letter. He asked you if you wrote it?

A. Yes, that is my writing.

Mr. COLE.—We will offer that in evidence.

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

Whereupon said letter was admitted in evidence and marked Defendant's Exhibit "C" of this date. [187]

(Testimony of William Black.)

(Mr. Cole hands witness another paper.)

The WITNESS.—(Examining.) Yes, I wrote this letter too.

Mr. COLE.—I wish to offer these in evidence. You wrote these four?

A. No, I never wrote that letter (indicating).

Q. You did not write that?

A. No, I wrote that letter (indicating).

Q. You wrote this one (indicating)?

A. I wrote that one (indicating).

Mr. COLE.—I wish to offer this in evidence.

The WITNESS.—I wrote this one (indicating) and not this (indicating).

Mr. LANGHORNE.—No objections. Which is the one he said he did not write?

The WITNESS.—This one, and this one (indicating). There are two I did not write.

Mr. COLE.—Do you know who wrote these?

A. I think Mr. Kayler wrote these.

Q. And you signed them?

A. I signed them, that is my signature.

Q. You sent them to Mr. Lloyd?

A. I sent them to him.

Mr. LANGHORNE.—No objections to any of them.

The COURT.—They may be admitted.

Whereupon said letters were admitted in evidence and marked Defendant's Exhibits "D," "E," "F," "G" and "H" of this date.

Q. Have you got the letters that were written to you by Mr. Lloyd?

(Testimony of William Black.)

A. I have not. I turned them over to one of my attorneys, [188] Mr. Miller, and I do not know what he done with them.

Q. You are not able to find them?

A. I cannot find Mr. Miller.

Mr. LANGHORNE.—That is Mr. Miller of South Bend?

A. Mr. Miller of South Bend. He has left the country.

Mr. COLE.—You also wrote this letter, did you (indicating)?

A. (Examining.) Yes, I sent it. I can tell by the Spencerian penmanship.

Mr. COLE.—Any objections to that?

Mr. LANGHORNE.—Not the slightest.

The COURT.—It may be admitted.

Whereupon said letter is admitted in evidence and marked Defendant's Exhibit "I" of this date.

Q. This letter of October 11th that you wrote was in reply to Mr. Lloyd's letter of October 9th, wasn't it?

A. I do not remember, I did not pay any more attention to it.

Q. Well, you received the original of this letter (indicating)?

A. (Examining.) I think I did; yes, I think I received it.

Mr. COLE.—I wish to offer that in evidence.

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

Whereupon said letter was admitted in evidence

(Testimony of William Black.)

and marked Defendant's Exhibit "J" of this date.

Q. Here is one August 31st, saying it is in reply to your favor of the 29th; all this correspondence, Mr. Langhorne, was in reply to his?

The WITNESS.—I think that is right.

Q. And this is one they wrote to you after they received [189] your proof of loss (indicating)?

A. Yes, sir.

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

Whereupon said letter was admitted in evidence and marked Defendant's Exhibit "K" of this date.

The WITNESS.—Yes, I surely received that, and I answered it, too.

Q. And this one here is part of the correspondence (indicating)?

(Witness examines paper.)

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

Whereupon said letter was admitted in evidence and marked Defendant's Exhibit "L" of this date.

The WITNESS.—I do not remember. I guess I received it, though. It is all right; I probably received it.

Q. Here is one dated August 20th, 1912.

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

Whereupon said letter was admitted in evidence and marked Defendant's Exhibit "M" of this date.

Q. This correspondence represents most of your dealings with the company after the fire? That

(Testimony of William Black.)

is about all of your negotiations?

A. That is all with the exception of the adjuster and that other man coming down there in January, 1913, six or seven months after this fire.

Q. That was after you started the suit, wasn't it?

A. Yes, they came down after the suit was started. Yes, [190] that is right.

Q. How about your cigars? Did you sell many cigars? A. Well, in the summer-time, yes.

Q. You are making claim here for some cigars that you bought in 1910, are you not?

A. I am making a claim for the cigars that I had in my building when I took stock.

Q. Now, some of these cigars were bought in 1910 by you, were they not?

A. I had cigars in 1910, some, I guess.

Q. And you bought cigars in 1911 that you make claim for in your proof of loss.

A. Well, say, I could not—(interrupted).

Q. You could not remember those dates?

A. I cannot remember. I bought lots of cigars and from different people, and I could not—(interrupted).

Q. You bought cigars from Gunst & Company, did you not?

A. Yes, Madison in Astoria and Taylor in Astoria.

Q. And some company in Portland?

A. Some company in Portland.

Q. Mason, Ehrman?

A. Mason, Ehrman & Company. I bought cigars in Seattle and San Francisco, and I bought cigars

(Testimony of William Black.)

from a man who came there; I bought cigars, tobacco, cigarettes, from a man who came there in May, 1912. He thought he would open up a cigar store, and they wanted me to charge him too much for rent and I bought 2,200 cigars from him, 1200 Optimos, and some other cigars, some plug tobacco and cigarettes.

Q. Some of these cigars you make claim for in your invoice [191] that you had on hand two years, would not be worth very much?

A. A cigar does not deteriorate if you know how to keep it.

Q. How long can you keep it?

A. I had some Y. and B. cigars from Mason, Ehrman, and I do not suppose I sold over a hundred of them. There was no call for them. Different men have different smokes, and they want different kinds of cigars, and you have got to have a large lot of different brands of cigars on hand, especially like the Carabanas, Y. & B.'s and Gatos. I bought lots of cigars from Campbell and Evans.

Q. What year did you buy from Campbell & Evans?

A. I cannot remember those dates.

Q. Campbell & Evans are out of business now?

A. I do not know whether they are or not. I will tell you the names of those cigars I bought from them, a great big large cigar.

Q. Your proof of loss, Mr. Black, shows a claim for cigars between $560 and $600 wholesale price. Now, about how many cigars did you sell a month?

A. In the summer-time you sell more.

(Testimony of William Black.)

Q. Could you give us something about the number you sold in the summer-time? A. I could not.

Q. Would you sell one a day or would you sell more than that? A. Yes, sure, more than that.

Q. Now, Mr. Dickinson testified that he sold about half a box during the month that he was there. That would be about an average of one and a half a day if he was there [192] thirty days?

A. I suppose so; you might estimate that, I could not.

Q. That would be a hundred cigars in sixty days, wouldn't it, in two months; that would be six hundred cigars a year on that basis?

Mr. LANGHORNE.—I object to that.

The COURT.—Objection sustained.

Q. Now, you make your claim—here is some goods that you bought, that you say you bought from Mr. J. J. Hagerty of Raymond?

A. It was J. J. Hagerty of Raymond, then, but he was doing business in Seattle. I bought some goods from him, yes, when he was in Seattle, I bought some Pineapple rock and rye. It was in big square bottles and I had a lot of that left.

Q. How many cigars did you buy from Mr. Hagerty?

A. I do not know; there was a lot of bulk liquor and case goods of different kinds. I do not remember; it was a long while ago, but I had some of his stock on hand that consisted of special stuff such as I told you, of Pineapple rock and rye. You see it in the list there (indicating).

(Testimony of William Black.)

Q. You do not know how long ago you bought that?

A. It was previous to *come* to Long Beach, maybe four years before.

Q. Maybe four years before you came to Long Beach? A. Yes, maybe four years before.

Q. It was about eight years from the time of the fire?

A. Yes. I bought some Damiania Bitters from him, too.

Q. Two cases of Pineapple rock and rye in your claim? [193] A. Yes, sir.

Q. Did you make any claim for any other goods that you bought from Mr. Hagerty?

A. I bought some Damiania Bitters.

Q. Anything else?

Mr. LANGHORNE.—He is speaking about the the proof of loss.

Mr. COLE.—Yes. Did you make any claim for anything else than the bitters in your proof of loss that you bought from Mr. Hagerty?

A. I do not remember. I know I bought quite a lot of goods from Mr. Hagerty at that time.

Q. The firm you dealt with, Blumaer & Hoch of Portland, sold you most of your goods?

A. Oh, no, not at all.

Q. They sold you more than any other firm?

A. No, sir.

Q. What firm sold you the most?

A. I bought from various firms, everybody and anybody.

(Testimony of William Black.)

Q. Tell me what firm did more business with you than the others?

A. I did lots of business with James J. Hagerty—not Hagerty but De Fremery of San Francisco. He is now dead, but the firm is still in existence.

Q. Your testimony tends to show that you bought about $2,900 worth from Blumaer & Hoch?

A. I bought more than that from them.

Q. You bought more than they have testified to?

A. I sold them certificates for twenty-five barrels of Sunnybrook whiskey.

Q. They gave you credit for that on that—(interrupted). **[194]**

A. Yes, in 1907—1908.

Q. It shows on that (indicating)? A. Yes, sir.

Q. You don't mean to tell the jury you got more goods from Blumaer & Hoch than they have testified to?

A. I never said I bought more than they testified to.

Q. I understood you to say you bought more than $2,900 worth? A. I suppose I have.

Q. From Blumaer & Hoch?

A. Yes, that is nothing.

Q. Now, you bought from several firms in Louisville, did you not? A. Yes, sir.

Q. Did you buy from any firms whose deposition we have not taken here in this case?

A. Yes, sir.

Q. Who was it?

A. The Old Times Distilling Company, or the Old

(Testimony of William Black.)

Times Distillery, and the Kentucky Distillery Company.

Q. The Old Kentucky Distillery Company?

A. Yes, sir.

Q. You do not mean Old Times, you mean Old Kentucky Distillery Company?

A. A lot of them distilleries have been absorbed by corporations. I believe one corporation has two now, the Green River Distillery is by itself, and Brown-Forman, and I believe they make the Frazier whiskey.

Q. What I want to find out is the names of the people you bought from in addition to those whose depositions we have [195] taken?

A. I bought from all of the first-class distilleries in the State of Kentucky, very nearly.

Q. Can you name some of them besides those we have mentioned?

A. Well, I cannot. I could if I could see a list of the distilleries, I could tell you those I have been doing business with about ten years, I guess.

Q. I am asking you just in regard to the stock that was destroyed by fire.

A. I have not got—I have bought whiskey from Fleckenstein.

Q. Fleckenstein is mentioned here?

A. Yes, sir. I have bought from Sherwood & Sherwood of San Francisco.

Q. Their deposition is mentioned in here.

A. Chevalier & Company.

Q. They are also mentioned here.

(Testimony of William Black.)

A. Yes, sir.

Q. These are answers to some interrogatories that were propounded to you, were they not?

Mr. LANGHORNE.—Just answer whether or not they are.

Q. Your signature is on the back. You do not need to read them.

A. William Black, yes, that is me.

Q. Now, in these interrogatories you say that you bought your stock from Julius Kessler of Chicago, and one firm in Baltimore, Blumenthal & Beckert?

A. Yes, sir.

Q. And those four Louisville concerns?

A. Yes, sir.

Q. And three in San Francisco? **[196]**

A. Yes, sir.

Q. And Blumaer & Hoch in Portland, and Fleckenstein in Portland, Rothchild in Portland, Ecklund in Portland, Sherwood & Sherwood in San Francisco and De Fremery & Company, Bonney Brothers? A. Loyal Kentucky.

Q. You state in your answers to these interrogatories that you bought some of that stock from the Sunnybrook Distillery Company, did you not?

A. I never said that I had any Sunnybrook whiskey. I said that I sold twenty-five certificates to Blumaer & Hoch. I did not like the whiskey and I sold them the certificates.

Mr. LANGHORNE.—How many barrels?

A. Twenty-five barrels. I never had any Sunnybrook in my house.

(Testimony of William Black.)

Q. It says in answer to Interrogatory Number 41, "To the best of his recollection and memory, that the names of other persons, firms or corporations, from whom he has purchased all other goods upon which the above-entitled action is based, and for which a claim of loss is made, are as follows, to wit:" And among them is the Sunnybrook Distillery Company?

A. Yes, sir.

Q. The Sunnybrook Distillery Company. That was wrong, was it?

A. I bought that from—(interrupted).

Q. You did not get any of your stock from the Sunnybrook Distillery Company?

A. I bought twenty-five certificates but sold the certificates. [197] That is one of the firms I done business with but I never sold Sunnybrook whiskey.

Q. You read this before you signed it?

A. That is a mistake in there, an oversight, because I never sold any Sunnybrook whiskey.

Q. You never had any in your saloon?

A. I never had any in my possession that I know of.

Q. You bought Sunnybrook and turned the certificates over to other parties? A. I sold them.

Q. You never had any in your saloon?

A. Never had any Sunnybrook in my store to my knowledge.

Q. That is incorrect (indicating)?

A. That statement there is a mistake if it is there.

Q. Are you sure you bought some goods from the

(Testimony of William Black.)

Old Kentucky Distillery Company? Could you swear to that?

A. I think that is the name of it; it may have some other name—Old Kentucky—the brand of whiskey they make is called Honey Dew whiskey and that is the name of the distillery.

Q. Can you give me the name of any firm from whom you bought goods that is not mentioned in this statement?

A. Well, I bought goods from so many people that I cannot remember them all in that length of time.

Q. Is it not a fact, Mr. Black, that this list consists of all that you bought for your saloon?

A. Since I have been in business so long, I do not remember all of the firms; that would be impossible for me to do that.

Q. Where did you get this information that you set out here **[198]** (indicating)?

A. It was just firms that I remember that I done business with.

Q. Did you remember Mr. Hagerty eight years ago?

A. He is down in my country and he is now in the banking business; he graduated from the saloon business in the banking business.

Q. You remember Sherwood in Frisco; you didn't buy any since the earthquake?

A. *There may be* pay for some whiskey that went down on the Columbia, some whiskey that was not insured, and they made me pay for it. They made me pay for the goods that were lost and duplicated

(Testimony of William Black.)

the order that was lost, and collected for that too.

Q. Did you make a claim for these goods that went down on the Columbia?

A. Yes, I gave it to a lawyer and the lawyer told me that if I did not pay for it—(interrupted).

Q. You gave them as one of the firms?

A. I had bought lots of imported goods from them, but I never purchased any after they did that to me, but I had some Sherwood & Sherwood imported goods on hand.

Q. You didn't buy any from them since the earthquake?

A. They don't make any whiskey. I have got whiskey of them for years.

Q. That does not answer the question. Did you ever buy anything from them since the earthquake in 1906?

A. If you can remember when this Columbia went down, right after that they duplicated the order and made me pay for both orders, the first thing I knew they sent me [199] a dun, please remit, and I wrote on the bottom of it that I never received these goods, and they said that the goods had been lost on the Columbia and they had duplicated the order and I thought as they had done previously they had these goods insured, and they claimed these goods were not insured, and I had to pay for them.

Q. Going back to the time of the taking out of the policy. Before you got this policy you had insurance on your stock for $2,000? A. Yes, sir.

Q. And Mr. Loomis carried that insurance for

(Testimony of William Black.)

you? A. Yes, sir.

Q. Mr. Loomis is an insurance agent at Long Beach? A. He lives at Nahcotta.

Q. That is in your neighborhood?

A. Yes, it is seven or eight or ten miles.

Q. And he had a policy of $2,000 on your goods?

A. Yes, sir.

Q. $1,500 on the building?

A. $2,000 on the building.

Q. That was on the fixtures?

A. I believe so, maybe.

Q. Now, his policy expired on the 16th of June, didn't it? A. No, sir, it expired in July.

Q. July, 1912?

A. I think so. I would not be positive.

Q. You would not swear to that?

A. Say, I won't swear to anything that I am not sure and certain of.

Q. And you returned this policy to him on the 8th of June, [200] didn't you?

A. I returned his policy to him after I took out another policy; that is the present policy.

Q. And you returned this policy to him before it expired?

A. I returned it before it expired, yes, sir.

Q. And between the time that you had that $2,000 —between the time that you returned that insurance of his and the time you took out this policy, you had a policy of $5,000 in the Royal Insurance Company, which was cancelled too, didn't you?

A. On that—(interrupted).

(Testimony of William Black.)

Q. On the stock of goods?

A. Now, I will tell you—I do not—there is something about it—I do not know whether it was before or whether it was on the hotel that I took it out, after the fire. I know there was a policy or two, somebody wrote up these policies and then they wrote back the agent did not care to take the risk under the present conditions, down there. I do not know whether it was on the saloon or whether it was on the hotel at the time of the fire. I had no policy on the hotel but after this fire I took out a policy and it was rejected, sent back, and I saw the letter and they said to the agent they did not wish to take the risk under the present conditions or something to that effect, existing in Long Beach at that time.

Q. On account of its going dry?

A. On account of the different fires that had occurred and the factions there and so on.

Q. Did you have any more stock under the other policy than **[201]** you had under this one?

A. I would like to explain something to you and the jury.

Q. Go ahead.

A. Right back of this building I had a warehouse and that is where I had the whiskey and where I kept lots of goods. It was a straight up and up board, twelve inches high, one shed roof, no *battings* on the cracks. It was built out of green lumber. Someone had broken in there and stolen some of the goods out of that place, not much, a few bottles, they stole some Budweiser beer I had stored in there in

(Testimony of William Black.)

barrels and I removed all of this liquor I had in this storeroom into the main building, because it was not safe. They could go in there. There was cracks in the storeroom, and they could pry loose and take this stuff out. I never had an insurance on that stock in there. They pried it open at the bottom of the boards and worked it like a door. I wish Mr. Stit could have testified; he has been in there.

Q. How many barrels did you have in that outbuilding?

A. A number of them. I could not state how many.

Q. Did you have two?

A. Oh, yes, a lot more than that.

Q. A dozen?

A. Six or seven or eight barrels in there.

Q. What brands were they?

A. Different brands.

Q. Name some of them.

A. There were five barrels of Old Crow in there.

Q. Now, at the time you took out this policy, you had some [202] conversation with Mr. Loomis about his writing some insurance on this stock, didn't you? Didn't you ask him for a $5,000 policy on it?

A. I never asked Mr. Loomis a thing about it. I was going to cancel my Loomis policy but that man had had two or three fires and he had had trouble, he had made trouble, and I was going to quit him, I had promised this other agent that I would give it to him.

(Testimony of William Black.)

Q. Isn't it a fact that you told Mr. Loomis that you wanted $5,000 on that stock?

A. Never told Mr. Loomis nothing of the kind.

Q. Will you swear to that?

A. I will swear to that.

Q. Did you have any other conversation with him about your going to fix all of the people and get out of there, something like that?

A. The only conversation I had with Mr. Loomis was I had a row with him in front of the hotel. He told some people after this fire took place that he was too sharp, they could not catch him; that he had cancelled my policy just previous to this fire.

Q. Said that he had?

A. He told some people that at the life-saving station.

Q. Is it not a fact that you asked Mr. Loomis to give you $5,000 on this stock, and he said the insurance company was from Missouri and you would have to have the stock, is not that a fact?

A. No such a conversation as that ever took place between me and Mr. Loomis, and furthermore I had not even seen Mr. Loomis for two months previous to that fire. [203]

Q. You did not have any talk with him?

A. No, sir—or more, possibly more.

Q. You didn't have a talk with him in May, 1912?

A. No, sir, I did not.

The COURT.—If you expect to impeach him, you will have to fix the place and time and persons present.

(Testimony of William Black.)

Q. Didn't you have such a conversation with Mr. Loomis about the month of May at Long Beach?

A. No, sir, I did not. I never had any such conversation with Mr. Loomis or any other man. If you wish to know the circumstances, I will tell you why I took out this $5,000 policy.

Q. Go ahead.

A. Well, I am going to tell it. In the first place, if you wish, I will go right into the matter.

Q. We want to know why you took this out.

A. I will show you the whole business. We will get right down to the foot of the ladder and climb up. Now, in lots of places, gentlemen—(interrupted).

Mr. LANGHORNE.—I do not think the jury and the Court desires to hear your troubles with other people down there unless counsel insists upon it.

Mr. COLE.—We would be glad to hear it if he wants to explain.

The COURT.—Ask your questions.

Q. Will you explain why it was that you took out that $5,000 policy?

A. Well, I would—(interrupted).

Mr. LANGHORNE.—Now, explain.

A. I had written a letter to the "Evening Telegram" of April **[204]** 18th, exposing a bunch down there that was trying to catch people of small means, selling them lands upon misrepresentations, and one of these parties tried to catch a friend of mine for $6,000, and I knocked it in the head. Then they got sore and said I was a knocker and they were

(Testimony of William Black.)
going to do me up, and they started to work and got up a petition and people would not sign it. Most of them said, "If you want to put the saloons out, we will sign for all, but we won't sign against a loan." That kind of died down and then they got at it again. I kept on. They said they were going to do me up. That was all right, I thought I could hold myself level with them but why I took out this insurance, what scared me up, there was a lady and her husband ran one of the branches of the Aberdeen store, Mrs. C. E. Kerlee and a lady, they are friends of mine and we visit back and forth and they have a little boy, and there is a preacher's son, and I believe they have what do you call it?

Q. Remonstrance, petition?

A. No, sir, what you get from a witness.

Q. Affidavit?

A. An affidavit from this young fellow of eighteen years of age who was talking with this young lady after the fire at Seaside and she said it was pretty bad to have a fire at Seaside so close to the opening of the season, and he said, yes, it is too bad. We are going to have a fire in this town some of these nights and she says, "How is that?" And he said, "This saloon of Bill Black's is going up in smoke," and she tried to get out of him **[205]** the reason. She came over and told my wife and I was sitting by the stove reading; there was nobody in there and she called me out and told me the circumstances, and I locked the door and went over and saw this lady, and she told me the conversation. My wife does

(Testimony of William Black.)

not speak very good English, she came from South America, and I thought probably my wife misunderstood her and she told me the conversation. Then I hunted this boy up and he did not give me no satisfactory answer under *and* the conditions—of course, naturally, his father being a preacher and opposed to saloons, and the boy naturally would mingle with the church people and I thought that he might have heard something that dropped and he did not want to tell it. I goes right to Kayler and I says, "Here, I am going to get my own insurance. I am afraid they are going to try and burn me out," and I told him the circumstances, and I said, "If you will take the risk, all right, and if you don't I will go down and I will see Brunbaugh, but if you want to take the risk all right." I did not use any underhand methods. That was open and above board. And I will tell you another thing, if I had been in that town when that fire took place, I would be in Walla Walla to-day; they would swear that they seen me in the building,—leaving the building.

Q. You think the object of these people was to burn this property and send you over there?

A. I believe it was, exactly, yes, I do, and so does every fair-mined person down there.

Q. That is your theory of the fire, that your enemies burned **[206]** it?

A. Yes, that is my theory; that is my opinion.

Q. This petition you spoke of as being circulated around there, is this the petition (indicating)?

A. In the first place I never saw this petition;

(Testimony of William Black.)

this is only hearsay.

Q. That has been shown to you?

A. I never saw this petition myself, but I—(interrupted).

Q. Who circulated it?

Mr. LANGHORNE.—What is the object of this?

Mr. COLE.—He stated that he never heard about any petition being circulated.

Mr. LANGHORNE.—I object to all this as absolutely irrelevant and immaterial and not proper cross-examination.

The COURT.—Objection sustained.

Q. Who was it told you it was being circulated?

Mr. LANGHORNE.—I object to that for the same reason.

Objection overruled.

A. I do not remember who it was. I heard it. I did not pay much attention to it at the time.

Q. And you knew it was afterwards filed with the county auditor?

A. I did not know anything about it. All I knew is that there was a petition being circulated around there. They said I was a knocker, that I was knocking the cranberry lands around there—(interrupted).

The COURT.—Answer the question. You must try this lawsuit alone, not by trying for general results.

Q. On the 13th day of March, 1912, the deputy assessor,—what is his name,—came in to assess your property? **[207]** A. Shaygren.

(Testimony of William Black.)

Q. You had some conversation with him there in your saloon as to the amount of stock you had on hand? A. Probably I did, naturally I would.

Q. Is it not a fact that you stated to him that you were running your stock down, that you were going out of business?

A. I never said anything of that kind to him about that.

Q. Isn't it a fact that you stated while he was there, and in his presence, you went and got a hammer and went around and tapped all the barrels to show that they were all partly empty? A. I did not.

Q. Did you have any conversation with him as to the amount of stock you had on hand?

A. I told him there was the stock, "Help yourself, go to it."

Q. Did he ask you to place a valuation on it?

A. No, sir—(interrupted).

Q. Now, did you have any conversation with Mr. Hazeltine, of South Bend, down there at Long Beach, about two years prior to the fire in which you stated that you were running your stock down and was going out of business?

A. The only conversation that I remember of ever having with Mr. Hazeltine in regard to the liquor business was this: He told me, he said, "Black, I hate to see you in the business. You are not the man for that business"—(interrupted).

Q. You can answer that question yes or no. **[208]**

Question read.

A. I do not remember of having any conversation

(Testimony of William Black.)

with Mr. Hazeltine. He is not a saloon man at all, he does not go into saloons—(interrupted).

Q. That is all. Never mind. Did you ever have any conversation in your saloon with Mr. Brown, the Assessor, in which you stated you were running your stock down and you did not have much of anything on hand and the barrels were empty?

A. With Mr. Brown?

Q. Yes.

A. No, sir, never did, that my barrels was empty and that I was running the stock down, never did.

Q. I will ask you whether or not there was substantially the same conversation with Mr. Brown that I asked you about in connection with Mr. Shaygren?

A. I do not remember of ever having any conversation with Mr. Brown in regard to my liquors.

Q. When you hired Mr. Dickinson, you went to Portland at once, in May? A. Yes, sir.

Q. How long did you stay in Portland?

A. I guess a couple of weeks or so. I do not remember exactly.

Q. When did you go over there?

A. I think I came down to Astoria and then came over home.

Q. You state you left Long Beach on the 27th of May and stayed in Portland about two weeks. That would be about the 10th of June?

A. I do not remember the exact dates. **[209]**

Q. Do you remember the date that you went—that you went to Portland?

(Testimony of William Black.)

A. I do not remember the dates I went to Portland.

Q. When you went back to Long Beach on the 22d, did you go straight from Portland or did you,—had you been in Astoria a few days?

A. When I left the last time, I went to Astoria.

Q. You did not go to Long Beach?

A. I did not go to Portland, I went to Astoria.

Q. How long had you been in Astoria?

A. From the time I left up to the time of the fire—(interrupted).

Q. I mean when you went over there before the fire, you were over there at Long Beach Saturday before the fire, the 22d, did you go from Astoria or Portland when you went to Long Beach at that time? A. From Astoria or Portland?

Q. Yes.

A. I think I stayed in Astoria a day or so.

Q. Came down from Portland?

A. Came down from Portland on the train.

Q. And then you stopped at Astoria a day or so?

A. I am not sure whether I did or not.

Q. You are not sure whether you stopped at Astoria or went direct to Long Beach?

A. That is right.

Q. When you went back to Astoria, from Long Beach, did you stop at the Parker Hotel?

A. The Parker House, I always stay there.

Q. I see. Now, when you went to Long Beach on the 22d of **[210]** June, did you go on the regular launch? Do you remember the name of it?

A. Yes, sir.

No. 2395

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

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Plaintiff in Error,

vs.

WILLIAM BLACK,

Defendant in Error.

VOLUME II.
(Pages 225 to 504, Inclusive.)

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

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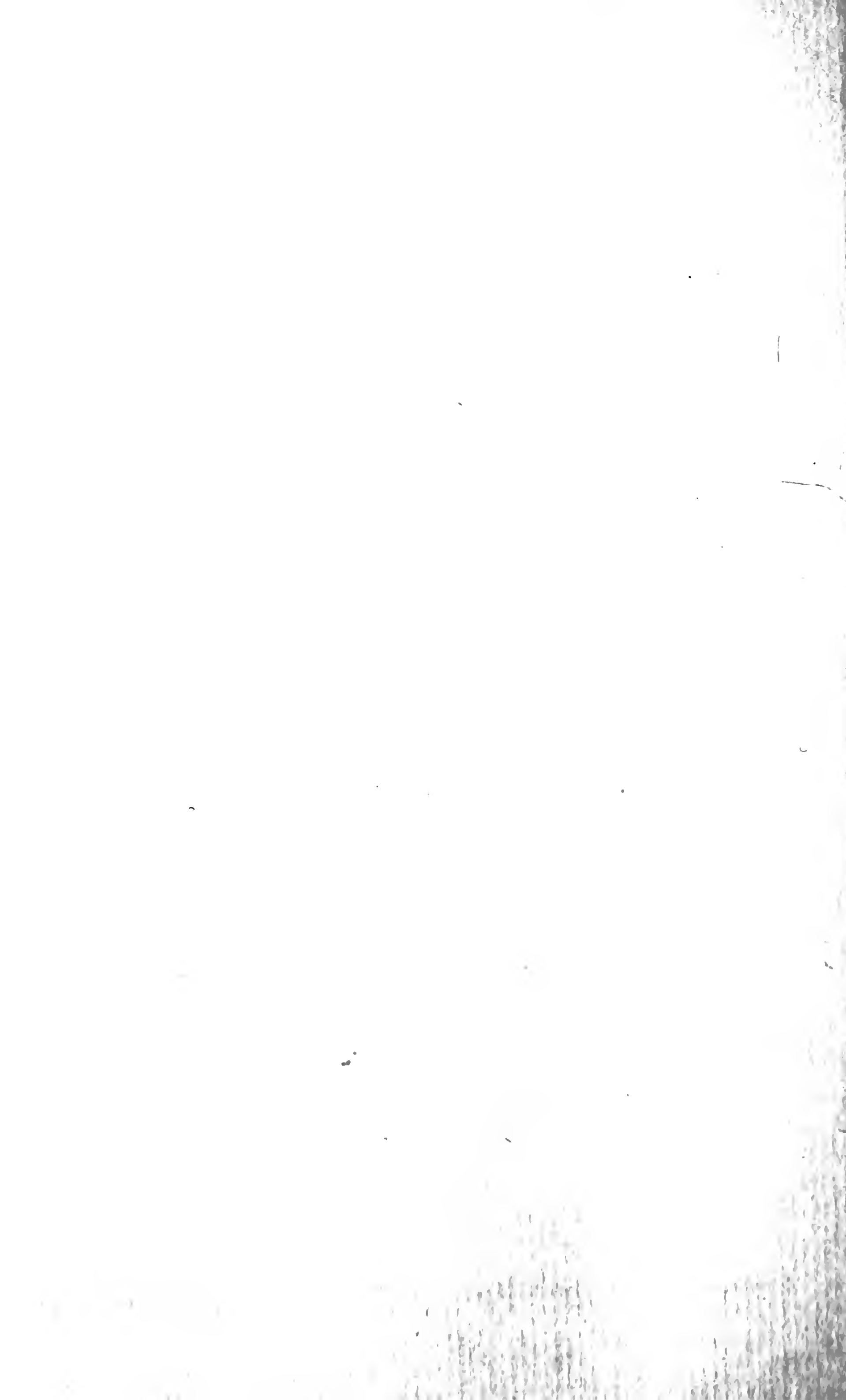

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(Testimony of William Black.)

Q. It was not the regular launch that crossed the river?

A. Yes, sir, it is the regular launch that crossed the river.

Q. What is the name of it?

A. Captain Haggbloom's launch, the "Hulda I." It was on the 22d. It was on Friday night.

Q. It was on that trip, anyway?

A. The 22d, I think so, yes.

Q. I believe you stated yesterday you did not know whether your license expired the first of July or the fifteenth of July, didn't you?

A. I believe I stated it expired about the 12th of July, I would not be positive.

Q. You went over to Long Beach on the 1st of July, 1908, did you? A. Went from where?

Q. You went over to Long Beach on the 1st of July, 1908?

Mr. LANGHORNE.—He has answered that question about four times.

A. I told you I went over from Astoria, on Friday, I think it was—(interrupted).

Q. I mean when you moved your saloon from Ilwaco.

A. I opened on the 12th day of July, that is the day I opened there.

Q. The goods went from Long Beach, were shipped from,—over the Ilwaco railroad?

A. Yes, I had some brought on the railroad and some on the [211] wagon that I did not have room for.

(Testimony of William Black.)

Mr. LANGHORNE.—I object to that as all having been gone over before.

Q. I mean the goods you bought after you moved to Long Beach, you received them over the Ilwaco railroad?

A. Some of them and I think I had a lot of them hauled up by team. I tried to patronize Haggbloom all I could. He was a poor man and I wanted to give him whatever I could for his boat, freight that came from San Francisco, from California and other places. He hauled lots of freight for me.

Q. He carried it over on his launch?

A. Yes, sir.

Q. And from Ilwaco to Long Beach it was carried on the railroad?

A. Carried by teams—no, sir. The railroad and I did not do business. He was running in opposition to the railroad and of course they did not take much freight, and so I had to get teams to haul it up. The teams hauled beer and ice and such stuff as that from Ilwaco. He brought them over on his launch. They all signed up to support him and help him out, but I was about the only one that stayed with him.

Q. Did you receive any goods at Ilwaco or at Iong Beach over the Ilwaco railroad?

A. I have got goods that way, yes, sir.

Q. Most all of them? A. Most by teams.

Q. Most by team? A. Yes, sir. **[212]**

Q. Now, I would like to ask you something about this purchase that Mr. Kayler testified about, this

(Testimony of William Black.)

sale. How long have you known Mr. Black, the man you made the deal with?

A. A number of years off and on.

Q. When was that deal called off?

A. It was never called off.

Q. It was still pending at the time of the fire?

A. Still pending, yes, sir.

Q. You had your invoice taken at the time you took your last policy, did you?

A. I took the invoice—when I got his letter, shortly after I got Mr. Mack's letter.

Q. That was in May, was it?

A. That was in May, I think so.

Q. Now, there was three duplicates of this invoice made out? A. I do not remember.

Q. Three copies; you do not remember that?

A. I do not know.

Q. You received one, however?

A. I had one that I took with me, yes, sir.

Q. Is this one that is attached to the proof of loss, one of them? Is this the one that was left with Mr. Kayler (indicating)?

A. I could not say. I do not know whether it is or not.

Redirect Examination.

(By Mr. LANGHORNE.)

Q. How many gallons to a barrel was there in the consignment of Old Crow Whiskey?

A. I think when I bought it it was forty-seven and a fraction [213] gallons when I first bought it.

Q. I believe you already gave to the jury your

(Testimony of William Black.)

idea of evaporation?

A. Yes, but I would like to explain another thing.

Q. Briefly.

A. The difference between rye and bourbon whiskey. The bourbon whiskey continues to improve for years and years and rye whiskey has a limit. After eight years it ceases, that is, the quality ceases to improve, therefore, the evaporation ceases in rye, so whenever you are drinking young whiskey, the four-year old, you are drinking the equal of eight-year old bourbon or more.

Q. What was Cedar Brook Whiskey?

A. That was a bourbon.

Q. How many gallons to a barrel of that?

A. It would evaporate down—(interrupted).

Q. How many originally?

A. There were forty-seven, forty-eight and forty-nine gallons.

Q. To a barrel? A. To a barrel, yes, sir.

Q. Now, the Green River, how many gallons to a barrel? A. About the same.

Q. And the Penwick Rye?

A. About the same, same sized barrels, the barrels are all about the same size.

Q. About how many gallons in a barrel of Fox Mountain Whiskey?

A. I do not remember how many was in that.

Q. Approximate that as near as you can. **[214]**

A. Oh, probably thirty or thirty-five gallons.

Q. Two barrels of A. J. McBrayer's Single Stamp whiskey, how many gallons to a barrel?

(Testimony of William Black.)

A. Something like forty-nine gallons each.

Q. There is one thing more I want to clear up. When you made this original purchase, you purchased five barrels of Penwick Rye?

A. Five, yes, sir.

Q. And you had three on hand at the time—(interrupted).

Mr. COLE.—I object to that as leading.

Q. How many did you have on hand at the time of the fire? A. Three.

Q. And you disposed of the other two?

A. Yes, sir.

Q. Now as to the liqour, how many—how much of that did you dispose, of that 1906? A. 1906?

Q. Yes.

A. I had five barrels, one I had just tapped it and I rolled her up there and just put the faucet and the air hole in it.

Q. How many barrels of Cedar Brook did you buy originally? A. Five.

Q. How many did you have? A. Four.

Q. Now, the two barrels of Single Stamp, do you remember when you got that?

A. I got that in April.

Q. You bought other whiskeys between that time?

A. Yes, sir. [215]

Q. Other barrel whiskey? A. Yes, two.

Q. That you sold from time to time?

A. Oh, I sold lots of younger whiskey, such as Melwood, Double Stamp goods, and Brown-Foreman & Company, younger whiskey.

(Testimony of William Black.)

Q. Do you remember how many cigars were contained in the sale made by the sheriff to you there in September 1911?

A. No, sir, I could not say how many there was. I never counted them. I bought the stuff at a lump sale.

Q. How long was it before the fire that you purchased these cigars that you spoke of this morning from Mr. Hagerty? A. Sometime in May.

Q. In May?

A. Sometime in May, I do not know the exact date. I disremember now.

Q. Do you remember a fellow by the name of Hanneman, a local saloon-keeper who went out of business there? A. Yes, sir.

Q. Did you buy any liquor from him?

A. Yes, sir.

Q. When did he go out of business?

A. That was in 1911. He came to me and—(interrupted).

Q. I just wanted to know the fact whether you bought any liquors or not. A. Yes, sir.

Q. How many? A. Some champagne.

Q. What else? A. Some imported brandy. [216]

Q. What else?

A. Some imported English gin and some bulk gin in a demijohn, in one of these big demijohns; I do not know how many gallons there are in them, and some other stuff that I disremember.

Q. Now, you spoke awhile ago about removing this

(Testimony of William Black.)

liquor that was burned, from an addition—(interrupted).

A. It was not an addition. It was a building a little ways back, probably twenty-five feet.

Q. When was that removed? A. In May.

Q. What year? A. 1912.

Q. Is that the article you spoke of a minute ago in answer to Mr. Cole's question (indicating)?

A. Yes, sir.

Mr. LANGHORNE.—I will offer that in evidence.

No objections.

The COURT.—It may be admitted.

Whereupon said paper was admitted in evidence and marked Plaintiff's Exhibit 5 of this date.

Recross-examination.

(By Mr. COLE.)

Q. This liquor you said you bought from the sheriff's sale you afterwards sold a part of that to a saloon-keeper in Ilwaco by the name of Fred Croosley?

A. Just a few bottles. Somebody broke into his saloon and stole everything and he came up and he bought a few miscellaneous bottles.

Q. How much, do you know? **[217]**

A. I do not remember. Enough to hold him over until he could get some stock from Portland.

Q. If you took in a hundred dollars over the bar, about how much of that stock would go out in value?

A. I am going to explain this to you and to the jury. The most of the stuff that was drank down there was beer, and when the season was over I did

(Testimony of William Black.)
not handle no keg beer, because I could not sell it fast enough. It would stale and I would lose on it, and therefore I handled bottle beer, and the principal sale was bottle beer. Once in a while, you would sell a little whiskey.

Q. Will you answer that? A. What?

Q. Can you tell me if you took in a hundred dollars in sales, how much of your stock would go out?

A. The whiskey business is figured about fifty per cent profit.

Q. All the way through, cigars and beer and everything?

A. About that; that is the basis that the saloonmen figure on, fifty per cent profit.

(Witness excused.) **[218]**

[Testimony of Joe Anderson, for Plaintiff.]

JOE ANDERSON, a witness produced on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. What is your name? A. Joe Anderson.

Q. Where do you live?

A. Seaview, Washington.

Q. How long have you lived there?

A. I have been there for twelve years.

Q. How close is Seaview to Long Beach?

A. Two miles.

Q. What is your business?

A. Contractor and builder.

(Testimony of Joe Anderson.)

Q. You know Mr. Black, do you?

A. Yes, sir.

Q. Are you acquainted with his place of business?

A. Yes, sir.

Q. Did you ever do any work for him in the year of 1912? A. Yes, sir.

Q. What was it, Mr. Anderson?

A. I built an office—well, there was an old ice-box right back of the bar, and I tore that out and put an office instead.

Q. Did you help build and construct a rack for the holding of liquor barrels also? A. No, sir.

Q. At that time or at any other time, did you help to move some barrels of liquor into the saloon room or into the saloon proper? **[219]**

A. Yes, I had to move part of it.

Q. Where from?

A. Well, some of the case goods was standing right in my road where I was building the office and I moved it from over to where the rest was.

Q. Where was the barrel goods moved from?

A. There was four barrels of goods lying on the floor and I and my brother rolled them up on the rack in the front room.

Q. Did you bring in any from any other place?

A. It was all brought in when I came there.

Q. How many barrels of goods do you know there was?

A. I do not exactly remember, but between twenty and twenty-five barrels.

(Testimony of Joe Anderson.)

Q. How was they as to being full or empty, do you know?

A. To my knowledge most of them was full.

Q. And that was in what year and what month?

A. I think it was between the 10th and the 18th of May, 1912.

Q. Do you know anything about the case goods that were in there in that saloon?

A. I know it was all—(interrupted).

Q. About the number of cases, I mean. Did you have any general idea?

A. Well, there was a good many cases. There was one whole wall full, and some standing on the end of the building, the building was sixty feet long and twenty-two feet wide.

Q. That was a matter I overlooked. Can you give the jury an approximate idea of how many case goods there was? [220]

A. Well—(interrupted).

Q. If you know.

A. Between a hundred and fifty and a hundred and seventy cases I think.

Q. How was his saloon stock generally, that is as to whether it was a pretty full stock of goods in the saloon or a meagre stock? A. It was a full stock.

Q. How about the cigars, do you know?

A. I could not tell much about the cigars. I know there was lots of cigars, but how many there was I could not say; a good many of them.

Q. I do not suppose you know anything about the value of liquors. Were you ever in that business?

(Testimony of Joe Anderson.)

A. No, sir.

Cross-examination.

(By Mr. COLE.)

Q. How long have you known Mr. Black?

A. I have known Mr. Black for the twelve years I have been there.

Q. You have quite a number of business dealings with him?

A. Well, I done Mr. Black's work for the last three or four years.

Q. He holds a good many of your bills, down there?

A. No, sir.

Q. Did he ever have one? A. He had one.

Q. Did you say some liquors were moved from an outbuilding into the saloon itself?

A. Yes, there was a storeroom back of the saloon. [221]

Q. Did this outbuilding burn in the fire?

A. No, sir, I tore it down last spring. That building is about probably fifty or sixty feet from the saloon.

Q. You tore it down in the spring of 1912?

A. 1913.

Q. The spring of this year?

A. Mr. Black made some alterations in his hotel and built a new kitchen and some rooms and I used part of the lumber of that outhouse for the kitchen.

Q. You do not know whether these barrels were full or empty?

A. I know the barrels I rolled around and lifted were full.

(Testimony of Joe Anderson.)

Q. How many did you lift?

A. Probably I moved seven or eight.

Q. Can you estimate their weight?

A. No, sir, I cannot estimate no weight by rolling a barrel.

Q. Did you move these alone?

A. Well, I had a couple of men with me. Some I moved alone and some my men moved.

Q. And all these that you moved were full, were they?

A. Well, I do not know whether they were exactly full but they were heavy, I know that.

Q. Do you know how much an empty whiskey barrel weighs? A. No, sir.

Q. Do you know how much one weighs that is full of whiskey?

A. When the barrel is full of whiskey?

Q. Yes. A. No, sir.

Q. Did you tap any of the other barrels?

A. Well, I have been in Mr. Black's place several times. [222] Every time I pass there I go in and take a drink and I have tasted lots of goods, some of them I tapped myself and I know most of the barrels were full.

Q. When you say most of them were full, did you go around and knock on any of them?

A. No, sir, I never knocked on any of them.

Q. What means did you have of knowing that they were full?

A. Because, when you go into a place of business and you see—I know just about what kind of whiskey

(Testimony of Joe Anderson.)

they drink there and I know he had the kind everybody drinks and I know they were full.

Q. Did you say you helped him move in some from an outbuilding? A. No, sir.

Q. Those rolled were all inside of the building?

A. Yes, all of his stock was moved in from the warehouse to the saloon when I went to work.

Q. Before you went there?

A. When I started to work.

Q. When you were there, there was about twenty-one?

A. Between twenty and twenty-five. I could not say whether it was twenty-two or twenty-three,—there is between twenty and twenty-five.

Q. That is just an estimate, not the exact amount?

A. No, it is not the exact amount. I know the length of the building, and how many tiers of barrels there was.

Q. All in the front room?

A. They were all in the front room except a few in the back room.

Q. About how many were in the back room? [223]

A. I don't know exactly the number but—(interrupted).

Q. Half of them?

A. Oh, no. Three or four or five barrels.

Q. How about the case goods, did you notice any case goods?

A. The case goods was all in the back room except what was in the show cases in the front, in the bar-room.

(Testimony of Joe Anderson.)

Q. You could not give a very accurate estimate of how many of these barrels had been tapped, could you? A. No, sir.

(Witness excused.)

Noon recess. [224]

[Testimony of William H. Armstrong, for Plaintiff.]

WILLIAM H. ARMSTRONG, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. Will you tell the Court and jury your name?

A. William H. Armstrong.

Q. And your residence?

A. 3225 North 20th street, Tacoma.

Q. How long have you resided here in Tacoma?

A. Twelve years.

Q. Are you connected with the Olympic Club, Mr. Armstrong? A. Yes, sir.

Q. What is the business of that club?

A. Retail liquors.

Q. How long have you been in that business?

A. With the club?

Q. How long have you been in the retail liquor business? A. About twenty years.

Q. I suppose during that time you have become somewhat acquainted with the prices of various liquors? A. Yes, buying.

Q. Have you bought considerable liquors?

A. Yes, sir.

(Testimony of William H. Armstrong.)

Q. Extending over a period of how many years?

A. Fifteen years, purchasing.

Q. Will you kindly tell the jury whether or not the value of liquor increases with age?

A. Yes, it does.

Q. Will you tell the jury what the reasonable market value of Old Crow, of a brand of liquor known as Old Crow [225] liquor, 1906, would be worth per gallon in June, 1912?

Mr. COLE.—We object to that on the ground that he has not qualified, no proper foundation laid.

The COURT.—Objection overruled.

Exception allowed.

Q. Answer the question.

A. I should judge about five and a half or six dollars a gallon. Of course, a good deal depends on whiskies when they get to an age like that, how much would be in the market or what sources you buy it from.

Q. Do you know whether or not Old Crow liquor was a prevalent liquor, for sale, last year?

A. Old Crow is one of the leading brands of liquors here for a good many years.

Q. Yes, but was it for sale in large quantities? That is what I mean, last year?

A. I do not believe that age of whiskey was. I think they had run pretty well out. They were selling, four and five year old whiskey, mostly four year old.

Q. Then, if I understand you correctly, the older liquor gets, by reason of its age it becomes more valu-

(Testimony of William H. Armstrong.)

able? A. Yes, sir.

Q. Now, taking up Cedar Brook, McBrayer's Cedar Brook; are you acquainted with that brand of whiskey? A. Yes, sir.

Q. Of the 1903 distillation, what would be a fair market price per gallon for that liquor in June of last year?

A. Is this based on the sale per gallon, per barrel or is it retail?

Q. If I understand—I mean by the gallon, where it is sold [226] in gallon quantities.

A. It ought to be worth seven or seven and a half to eight dollars a gallon.

Q. That is at retail, but what is its fair market value per gallon?

Mr. COLE.—I object to that as incompetent and immaterial.

Objection sustained.

Q. Now, going to the liquor known as Penwick Rye of 1904, you are acquainted with that brand of liquor, are you? A. Yes, sir.

Q. What would be the fair market price per gallon of that liquor in June, 1912?

A. I should judge that would be about seven or seven and a half dollars, about seven dollars; there is a year's difference.

Q. Now, the liquor known as the Green River variety of 1902 vintage which would be ten years old in 1912. What would be the fair market price per gallon of that liquor in June, of last year?

A. Of 1902?

(Testimony of William H. Armstrong.)

Q. Yes.

A. That would make it about ten years old.

Q. Yes.

A. I would call that whiskey in the spring of 1902 thirteen years old.

Q. What would be the fair market price per gallon?

A. Well, that whiskey ought to be worth about nine dollars a gallon. As I have said, a good deal is based on the supply and the source a man would buy it from.

Q. Now, what was the supply of that liquor? [227]

A. I am not familiar with that.

Q. You say you have been in the liquor business some twenty years? A. Yes, sir.

Q. Is it anything unusual for a liquor dealer to have on hand to-day goods that he bought four or five or six years ago?

A. In my present occupation, I have been twelve years and I have, not a great deal, but I have different brands of liquors, bitters, and things like that, that were in the house when I came there. The demand, of course, changed.

Cross-examination.

(By Mr. COLE.)

Q. These prices that you gave, Mr. Armstrong, as six, eight and ten dollars a gallon, are retail prices where it is sold by the gallon over the bar?

A. Of course the original cost and the shrinkage and the freight and the storage.

(Testimony of William H. Armstrong.)

Q. A little profit figured in? A. Yes, sir.

Q. And these are retail prices as if you sold it off by the gallon?

A. Yes, that is—well, now, take the Old Crow Whiskey at that age. If a man came in and asked me for a gallon of that whiskey at that age, it ought to be worth $10, because I doubt if a man could get any in the open market at that age.

Q. What you would charge him for it would depend more or less on your fancy?

A. I think it is, that value. **[228]**

Mr. COLE.—I move to strike out the witness' evidence as not competent.

The COURT.—The motion is denied and the objection overruled.

Exception allowed.

The COURT.—You ask a man to testify on a matter as to his opinion and it is apt to provoke an irrelevant answer.

Q. The prices you gave on these other goods were all retail prices? A. Per gallon.

Q. And the price of the liquor you think might be as high as $10 a gallon? A. Yes, sir.

Q. And you figure that way on the retail prices too?

A. Now, if a man came in and bought by the glass—

Q. I mean where you are selling out of your saloon by the gallon instead of by the barrel.

A. Yes, sir, $10 a gallon.

Mr. COLE.—I move that this testimony be

(Testimony of William H. Armstrong.)
stricken out, as incompetent.

The COURT.—Motion denied. You asked on cross-examination how much it could be sold for by the glass.

Mr. COLE.—Well, I did not think I asked him how much it was sold for. He testified that he sold some for twenty-five cents a glass out of the barrel.

Motion denied.

Q. You have never been in the wholesale business, have you? A. No, sir.

Q. And you are not familiar with the wholesale prices of the various liquors about which you have been asked here, in the month of June, 1912? **[229]**

A. Well, no, I could not testify in regard to the prices at that particular time.

Q. You could not state at what prices they could be bought in the market by the barrel at that particular time?

A. At that particular time, I do not remember.

Q. And that is true about all of the different liquors about which you have testified here, is it?

A. Well, the market price of liquors at that age.

Mr. COLE.—I move again that the testimony of this witness be stricken out because the plaintiff is not entitled to recover,—(interrupted).

The COURT.—Motion denied. The jury will understand that he is not necessarily entitled to recover the retail value of these liquors at the time and place where that fire took place but you are to consider the retail value in arriving at the market value of the goods—the entire market value of the

(Testimony of William H. Armstrong.)

entire stock of goods. There might not have been any wholesale market value of goods at this place. They may not have been selling liquors there at wholesale.

(Witness excused.) **[230]**

[Testimony of W. A. Hagermeyer, for Plaintiff.]

W. A. HAGERMEYER, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. State your name to the jury.

A. W. A. Hagermeyer.

Q. Your residence? A. Tacoma.

Q. What business are you engaged in?

A. Retail liquor business.

Q. You have bought and sold liquors, have you?

A. Sold.

Q. How long?

A. A little over—well, about three years.

Q. You are acquainted with the brand of whiskey known as the Old Crow brand, are you?

A. Yes, sir.

Q. And with that brand known as Penwick Rye?

A. Not so much acquainted with Penwick Rye as I am with Old Crow.

Q. Are you acquainted with Old Crow in a general way? A. Yes, in a general way.

Q. How did you arrive at that information?

A. Well, the same as I have with different brands

(Testimony of W. A. Hagermeyer.)

that are in the market.

Q. Are you acquainted with the brand known as Cedar Brook McBrayer's? A. Yes, sir.

Q. Now, I wish you would tell the jury what would be the fair market value per gallon of the brand of whiskey [231] known as—the fair market value per gallon of the whiskey known as the Old Crow brand 1906 vintage, double stamp?

A. Oh, I should judge it ought to be five or six dollars per gallon.

Q. What would be the fair market value of the Cedar Brook McBrayer 1903 vintage, double stamp?

A. Why, I should judge about six dollars, somewheres along in there.

Q. And the Green River double stamp 1902 vintage, ten and twelve years old?

A. Not less than seven dollars.

Q. Mr. Hagermeyer, in your business of liquor dealer, is it anything unusual for a person to have goods on hand at the present time that they bought two or three or four or five years ago?

A. I have some goods that were not bought by myself, but bought by my predecessor, wines and so on, that are over twelve years old.

Q. And you still have them on hand?

A. Yes, parts of them.

Cross-examination.

(By Mr. COLE.)

Q. These prices that you gave are prices where the liquor is sold by the gallon out of a retail store, are they?

(Testimony of W. A. Hagermeyer.)

A. Well, that would be pretty nearly what you would have to pay for this brand of goods at those ages.

Q. You are in the retail business? A. Yes, sir.

Q. Retail liquor business? **[232]**

A. Yes, sir.

Q. These figures you gave are those figures that you would sell this whiskey for by the gallon out of a retail store?

A. It would depend pretty nearly on what they had cost me.

Q. Do you know anything about the wholesale value of these liquors during June, 1912?

A. No, sir. I am not very well posted because I am not in the wholesale business. I do not know what the wholesalers have to pay for their goods.

Q. But these prices you mention would include the retailer's profit, at least some?

A. No, I would not think so.

Q. There would not be any profit in selling at that price? A. I hardly think so.

Q. Did you buy any of this kind of whiskey in 1912? A. In 1912?

Q. Yes.

A. No, but my partner bought some of those goods when I was in Olympia.

Q. Do you know what he paid for them?

A. Well, I cannot remember now.

Q. Did you buy any of these certain ages that he has mentioned? A. No, not myself personally, no.

Q. And you are not familiar then with the—for

(Testimony of W. A. Hagermeyer.)

what money these particular brands and ages could have been bought in the market for in June 1912?

A. In this way: My partner in 1912 bought all the liquor and I paid all the bills, wrote the checks out to pay for the invoices. **[233]**

Q. If a man was to buy a barrel of any of these different brands and ages of liquors mentioned in June, 1912, you could not tell what he had had to pay for it?

A. He would have to pay somewhere near I think those prices.

Q. That would be to buy it by the barrel?

A. Certainly.

Q. You did not buy any of those years?

A. Only in this way. I was in partnership and my partner did the buying and I paid the bills.

Q. He bought one of the brands you mentioned, that is all the experience you have had?

A. We do not all handle the same lines in bulk.

Q. What brands did your partner buy?

A. I think he bought Old Crow.

Q. Of what date?

A. I think the age you speak of.

Q. What is that? A. 1906.

Q. He bought some 1906 Old Crow, did he?

A. Yes, sir.

Q. Do you know what he paid for it?

A. As near as I can remember it was about five dollars, from five to six and a half dollars, on that line.

Q. You could not tell exactly?

(Testimony of W. A. Hagermeyer.)

A. I have not got the evidence here.

Q. Do you know where he bought it?

A. I think in San Francisco.

Q. What year did he buy it in?

A. Last year. **[234]**

Q. June of last year? A. I think so.

Mr. COLE.—I move that this witness' testimony be stricken out as incompetent.

The COURT.—Motion denied.

Exception allowed.

(Witness excused.) **[235]**

[Testimony of F. H. Canaris, for Plaintiff.]

F. H. CANARIS, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. What is your name? A. F. H. Canaris.

Q. Where do you reside?

A. Long Beach, Washington.

Q. How long have you resided there?

A. Thirty-three years.

Q. Is that all? A. That is all.

Q. What business were you engaged in down there? A. At the present time?

Q. Yes. A. Curio store.

Q. What business have you been engaged in in the past? A. Shall I tell you all of them?

Q. Just in a general way.

A. I was in the bath-house business and the hotel

(Testimony of F. H. Canaris.)

business, photograph business, and plumbing business,—(interrupted).

Q. That is enough. Are you acquainted with Mr. Black? A. You bet I am!

Q. How long have you known him?

A. I think it is about eighteen or twenty years.

Q. Were you acquainted with his saloon that was destroyed by fire in June of last year?

A. Yes, sir.

Q. Tell the jury, if you know, what kind of stock of goods he **[236]** had on hand in that store?

A. Well, I know that he had some pretty good whiskey. Of course, I did not buy it. It was only once in a while we would manage to get a drink of that, when a stranger came in for information, he would say, "Come on and let us have a drink—" (interrupted).

Q. I just want you to give in a general way what you know of his stock of goods, whether he had a large line of goods. A. Oh, yes, he had.

Q. Were you in the saloon shortly before the fire?

A. Yes, frequently.

Mr. COLE.—I object to that as leading.

The COURT.—Objection overruled. That is preliminary.

Q. Were you in the saloon shortly before the fire?

A. Yes, sir.

Q. When?

A. Well, I was in there pretty nearly every day, and sometimes more than once a day up to that time.

Q. Do you know where he kept his stock of barrel

(Testimony of F. H. Canaris.)

liquor in the saloon? A. Yes, sir.

Q. Where was that?

A. In the front room where the bar was. That is where the barrel goods was.

Q. How many barrels there?

A. I did not count them. I could not say,—somewhere about eighteen or twenty.

Q. Are you acquainted in a general way about what he had in the way of case goods in the saloon?

[237] A. Yes, sir.

Q. Tell the jury about the extent of the case goods that you saw.

A. The case goods was in the other room. There was an open space in there; there was no door; it was just an open space; you could walk right in. I think you could drive an automobile in there if you wanted to, and there was stuff in there—(interrupted).

Q. I do not care anything about that. I want an idea of the case goods.

A. There is where the case goods was piled up. That is what I wanted to tell about.

Q. About how many cases?

A. I do not know. I did not count them.

Q. Give the jury an approximate idea if you can.

A. Well, not less than one hundred and fifty cases, I should not think there was.

Q. Do you know how many there is in a case?

A. No, sir; I do not. I suppose there was a dozen.

Q. Well, what do you know about the cigar stock that he had on hand?

A. I don't know much about that. I saw lots of

(Testimony of F. H. Canaris.)

cigar boxes there, but I did not smoke them.

Q. Was there any barrels on the floor besides those on the rack?

A. I saw two on the floor that had never been tapped and put on the rack at all. Never been rolled up.

Cross-examination.

(By Mr. COLE.)

Q. You did not count these cases at all, did you? [238] A. What is the question?

Q. This is just an estimate about the cases?

A. No, sir. I did not count them, had no occasion to.

Q. Stacked up to the ceiling, one row?

A. Piled up on top of each other.

Q. How many tiers along the wall?

A. Just piled up near to the ceiling or very near to the ceiling.

Q. On which side?

A. On the north side of the building.

Q. You think there was one hundred and fifty, do you?

A. I think there should be that many, anyway. I could not say exactly.

Q. There possibly might have been more than that? A. There might have been more.

Q. There might have been less, too?

A. If it had been somewhat less—I would not say. That is an estimate I made, but I should judge there would be that many anyway.

Q. Do you know whether there was anything in

(Testimony of F. H. Canaris.)

them or not? A. That I do not know.

Q. Do you know whether there was anything in the barrels?

A. Yes, I know there was something in the barrels.

Q. In all of them?

A. I do not know whether in all of them, but a good many of them.

Q. They were all tapped? A. No, sir.

Q. You did not see any that were not tapped?

A. There were some that had not been tapped at all. **[239]**

Q. Were they in the back room?

A. I do not remember. Some of them had no faucets in them.

Q. Most of them were tapped, anyway?

A. Most of them.

(Witness excused.) **[240]**

[Testimony of Theodore Jacobson, for Plaintiff.]

THEODORE JACOBSON, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. What is your name?

A. Theodore Jacobson.

Q. Where do you live?

A. Long Beach, Washington.

Q. How long have you lived there?

A. Thirty years.

Q. What is your business or occupation down

(Testimony of Theodore Jacobson.)
there? A. Grocer.

Q. Do you know Mr. Black? A. I do.

Q. How long have you known him?

A. About fifteen years, I suppose. I could not say within a year, but I have known him, I think, ever since he came to the beach, or in that part of the country. I first met him when he was engineer on the Ilwaco Railway and Navigation Company.

Q. Were you ever in his place of business there?

A. I have been there.

Q. Were you ever in his place of business in 1912?

A. I was.

Q. Were you in there before the fire?

A. I was there the night of the fire. I guess I had about the last drink.

Q. Just state to the jury what you know in a general way about the stock of liquors that he kept there.

A. He had good liquors, and seemed to have lots of stock the [241] same as he had at Ilwaco, before he left Ilwaco.

Q. Where did he keep his stock of liquors, Mr. Jacobson, if you know?

A. Do you want me to describe it?

Q. Yes, briefly.

A. Suppose you entered there (indicating), that is where the door would be, and on the opposite side would be where the barrels were racked up. I never counted them, but I suppose there were, perhaps, about sixteen barrels racked up two tiers, and the night of the fire I know they were there and there was a couple or three barrels lying on the floor. I

(Testimony of Theodore Jacobson.)

remarked to the bartender why he didn't get them out of the way, that somebody would fall over them one of these times, something like that, and he had the case goods in the back.

Q. What do you know about the case goods?

A. I know that he had some there. I have seen him unload them. I did not stop to count them. I know they dragged in a lot of case goods.

Q. You frequently visited this store for the last two years?

A. Yes, when I wanted a good drink I generally went to Bill Black's.

Q. How about the extent of the stock of goods in June, 1912, compared with what it would be three or four years before? A. It looked the same to me.

Q. What do you know about his stock of cigars?

A. He had a good stock of cigars.

Q. How do you know that?

A. I was traveling for Campbell & Evans, the El Rayo cigar **[242]** people, and I sold Bill Black an order for a thousand cigars and I wanted him to buy more, but he said, "You notice I am all stocked up," and he had, I should judge, two or three or four hundred on hand. I know he had a large stock.

Q. When did you sell him cigars? A. In 1910.

Q. You know something about cigars, being in the cigar business?

A. Yes, I think I know something about what a cigar is.

Q. Well, now, did you and Mr. Black ever order cigars together? A. Yes, sir.

(Testimony of Theodore Jacobson.)

Q. Explain why that happened to come about.

A. The Hart Cigar Company told me they had orders for a thousand cigars, almost, from Bill Black, and he said it would be all right if Bill's came with those. I says, "Yes," and I delivered them to Black. I would have a little more cigars than Bill, because I handled quite a bit of cigars, and having fruit and other things coming together, there would be a saving on the freight bills.

Q. You would not state how many cigars he had in there at the time of the fire?

A. No, I would not. He had a good stock, and the quality was good.

Cross-examination.

(By Mr. COLE.)

Q. You gave your residence as Long Beach?

A. I do.

Q. You are in the grocery business? **[243]**

A. I have been.

Q. When did you quit the grocery business?

A. When did I quit the grocery business?

Q. Yes. A. Why, year before last.

Q. 1911? A. That would make it about right.

Q. You are a sort of private detective at this time?

A. Once in a great while.

Q. Isn't it a fact that your business the last two or three years has been that?

A. I sometimes make a living that way.

Q. Isn't your office in a saloon on Second Street in Portland?

A. There is a cigar store there. I stop in the

(Testimony of Theodore Jacobson.)

saloon—I do not take that—(interrupted).

Q. You claim Long Beach is your residence now?

A. I do. I vote there.

Q. Are you a married man? A. Yes, sir.

Q. Where is your wife living?

A. She is in Portland.

Q. How long has she lived in Portland?

A. Since we quit business at Long Beach this summer. I was there this summer.

Q. You say you sold cigars to Mr. Black in 1910?

A. Yes, I took an order from Bill Black.

Q. Campbell & Evans were out of business at that time?

A. They took in a partner. Mr. Evans is out of business now. **[244]**

Q. What was the price of these cigars, do you know?

A. $90.00. I took the order. Whether or not they filled it, I could not say.

Q. How long has your headquarters been at that address in Portland?

A. It has been there, I think, about three years.

Q. You just use the back room of that saloon there for an office?

Mr. LANGHORNE.—I object to that as absolutely immaterial.

The COURT.—Objection sustained.

Q. You made application to the company's representatives, didn't you, shortly after this fire, to ferret it out, to the company, your services?

A. Cole & Cole?

(Testimony of Theodore Jacobson.)

Q. Yes.

A. I did to Mr. Chessman, yes, sir.

Q. You stated you thought this thing could be run down—(interrupted).

A. I did, to find the truth of it. You people failed to put up the money, and I could not go through with it.

(Witness excused.)

Plaintiff rests. **[245]**

[Motion for a Nonsuit, etc.]

Mr. COLE.—If the Court please, I move for a nonsuit at this time, and in connection with that I wish to call the Court's attention to these letters, as one of the grounds for the nonsuit, his refusal to furnish bills and invoices and certified copies.

Argument.

(Jury excused during the course of argument.)

The COURT.—(After argument.) In this matter, where the insurance company puts in the policy, "shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made," that must be construed strictly against the insurance company. It is such a general and loose provision that a man who had had a loss would not know how to go about complying with it. If he furnished a certified copy by the man who sold the bill, they might come back and say, "We meant somebody else," they might say, "We meant a certi-

ficate by the merchant." The provision of the contract requiring that he produce these things is a wholesome provision and it is for the protection of the company, but when they have got a provision in there that he shall furnish them at some reasonable place, under the strict construction of the contract against the insurer, it is their duty to designate some reasonable place, and if they meant by this that he produce them in Portland, outside of the State of Washington, the Court would be prepared to hold that was an unreasonable place. **[246]** As I read this letter, your company had rejected his proof of loss, and told him that you would hold it subject to his order. As I read his letter, that is particularly what he is crying out against. He has done all in that matter that he will do, and when he says, "You have never called on me, and I have never saw you," that left the matter open to your company, and warned you that if you required anything more of him or anything in the line of matters you spoke of, about bills or invoices, his idea was the reasonable place would be down there in that town where he lives and the Court thinks so, too. In matters of this kind, the Court has heretofore held that these provisions are for the protection of the insurance company, and it would be presumed that a refusal to comply with them would work to their prejudice, and the Court has just been reversed for so ruling. The Court of Appeals has held that under a policy which required notice to the company immediately or at most within ten days, that that would not simply be enforced, and that the burden was on the

company to show that they were prejudiced by that lapse. The motion will be denied.

Exception allowed.

Mr. COLE.—I did not quite finish my motion. I would like to state that the motion for a nonsuit is based on the refusal of the plaintiff to furnish the defendant with copies of his purchases and invoices and his refusal to perform any of the other conditions in the policy on his part to be performed; and for the further reason that the market value of the property has not been shown.

The COURT.—That is an amendment to your motion, or is it a [247] further motion?

Mr. COLE.—I wish to offer it as an amendment.

The COURT.—Motion denied.

Exception allowed.

And the defendant, to maintain the issues on its part, introduced the following evidence: [248]

[Testimony of W. G. Loyd, for Defendant.]

W. G. LOYD, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLE.)

Q. What is your name? A. W. G. Loyd.

Q. Where do you reside, Mr. Loyd?

A. Portland, Oregon.

Q. Did you have anything to do with the adjustment of the loss of William Black at Long Beach under the policy under consideration in this action?

A. Yes, sir, I did.

Q. You were acting as adjuster for the Central National Fire Insurance Company? A. Yes, sir.

(Testimony of W. G. Loyd.)

Q. How was this adjustment carried on by you with Mr. Black?

A. After I was requested to take the matter up by the company, I went to Long Beach, and I happened to have a copy of the daily report and the form from the general agents, and knowing that it was $5,000 on stock and $1,000 on the fixtures and $2,000 on the building, I went to Long Beach to take up the matter of adjustment.

Q. Now, did you talk to him personally, Mr. Black, personally with Mr. Black while you were there?

A. No, sir, I did not.

Q. Your negotiations with him, then, were all carried on by correspondence? A. All at one time.

Q. I show you a copy of a letter to William Black at Long [249] Beach, Washington, dated August 20th, 1912, and ask you whether or not that is a copy of the letter which you wrote to him?

A. Yes, sir, I believe that to be a carbon copy of my letter to Mr. Black.

Q. Is that the first letter?

A. I think this is a copy of my first letter.

Q. I show you Defendant's Exhibit "C" and ask you whether or not that—(interrupted).

Mr. LANGHORNE.—These letters have all been admitted. The plaintiff admits that he wrote them.

The COURT.—I understand that they were offered at the time, but I noticed afterwards in Mr. Cole's offer he mentioned identification—(interrupted).

(Testimony of W. G. Loyd.)

Mr. LANGHORNE.—It is admitted that he wrote these letters.

Mr. COLE.—These particular letters were offered in evidence, but I wish to show that he carried on his adjustment wholly by these letters.

The COURT.—Very well.

Q. I will ask you whether that letter of Mr. Black's, dated August 23d, was in response to that (indicating)? A. Yes, sir.

Q. Can you tell when you commenced to write to him?

A. August 31st. That is a carbon copy of the letter of August 31st (indicating).

Q. That is Defendant's Exhibit "K." Did you get an answer to that? A. I believe I did.

Q. In order to hurry the matter, I will ask you if these letters, Defendant's Exhibits "F," "B," "E," "H," "D," "I," together [250] with your letter of September 1st, marked Defendant's Exhibit "L," constitutes the balance of your correspondence? A. Yes, sir.

Q. Did you have any further correspondence with the plaintiff subsequent to October 11th, 1912?

A. I think not.

Q. And his letter of October 11th, 1912, then was the last letter on the subject, was it?

A. I believe it was, yes, sir.

Q. Did you have any further negotiations with him between that time and the starting of this suit?

A. No, sir.

Q. On receipt of this letter, the matter was closed

(Testimony of W. G. Loyd.)

until the suit was filed? A. Yes, sir.

Q. Nothing further done? A. No, sir.

Q. And you first talked to him personally about it in January, 1913?

A. January, 1913, I think it was.

Q. Then the letters which have been introduced here as defendant's exhibits constitute the negotiations that you had with him by mail? A. Yes, sir.

Cross-examination.

(By Mr. LANGHORNE.)

Q. You had some conversation with him, you say, in January, 1913? A. Yes, sir.

Q. You asked him at that time to give you a written order on [251] the bank in Astoria so you could examine the condition of his bank account, did you not? A. Mr. Cole did. Mr. Cole was with me.

Q. This Mr. Cole?

A. No, sir, his brother. Mr. Black gave him that order.

Q. Mr. Black gave him that order?

A. Yes, gave it to Mr. Cole.

Q. He did not have any objection in giving it to you? A. I think not.

Q. And they also showed you a lot of old bills and invoices that were saved from the fire and were partially burned?

A. There were some bills and invoices, nothing material, that would have any bearing on the case at all.

Mr. LANGHORNE.—I move to have that stricken out.

(Testimony of W. G. Loyd.)

The COURT.—Motion granted.

Mr. LANGHORNE.—Please answer my question. He showed you a lot of bills and invoices of goods bought? A. Yes, sir.

Q. What did you do with them? A. Nothing.

Q. You didn't take them away with you?

A. No, sir.

Q. Did you examine them? A. Yes, sir.

Q. Didn't they relate to purchases made by him?

A. Very limited.

Q. To what extent?

A. I could not say to what extent.

Q. He told you that most of his bills and invoices had been destroyed in the fire, did he not? **[252]**

A. Yes, sir.

Q. You were the adjuster for the company during the year 1912, were you? A. Yes, sir.

Q. Why was it you did not go down there to the place where the fire occurred before you did?

A. I went down there soon after the fire. I think it was about two weeks.

Mr. COLE.—I object to that on the ground that it is incompetent.

Objection overruled.

Q. Did you see Mr. Black? A. No, sir.

Q Where was he at the time?

A. I do not know.

Q. You did not look for him?

A. No, sir, I did not.

Q. Made no inquiries for him? A. No, sir.

(Testimony of W. G. Loyd.)

Redirect Examination.

(By Mr. COLE.)

Q. Mr. Black ever furnish you with any copies of his bills of purchase? A. Never did.

Q. No certified copies of any of his bills or invoices? A. No, sir. He made no attempt to.

Q. I will ask you whether or not he ever stated to you or told you that he was not able to furnish any copies?

A. He told me in a letter that he would not furnish them.

Q. Was it later than that? **[253]**

Mr. LANGHORNE.—That letter is in evidence. I object to this testimony as the letter speaks for itself.

Objection sustained.

Q. I will ask you whether or not he ever furnished you with any inventory or other paper required by the conditions of the policy?

Mr. LANGHORNE.—I object to that as calling for a conclusion in the mind of the witness.

Mr. COLE.—That is too general. I was in a hurry to get the matter disposed of when I asked the question.

(Witness excused.) **[254]**

[Testimony of L. E. Loomis, for Defendant.]

L. E. LOOMIS, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of L. E. Loomis.)

Direct Examination.

(By Mr. COLE.)

Q. What is your name? A. L. E. Loomis.

Q. Where do you live?

A. Ocean Park, Washington, Pacific County.

Q. How old are you, Mr. Loomis?

A. Thirty-six.

Q. What is your business?

A. Fire insurance.

Q. How far is your residence from Long Beach?

A. About ten miles.

Q. How long have you lived there at Ocean Park?

A. I have lived at Ocean Park almost three years.

Q. Are you acquainted with Mr. William Black?

A. Yes, sir.

Q. How long have you known him?

A. Well, ever since he has been at the Beach, probably fifteen years or more.

Q. Did you ever have any business dealings with him? A. Yes, sir.

Q. What were they?

A. I had various business dealings with him.

Q. Did you ever have any insurance business with him? A. Yes, sir.

Q. How much?

A. I think I had four thousand dollars' insurance with Mr. Black,—(interrupted). [255]

Mr. LANGHORNE.—I object to that as absolutely immaterial and incompetent.

The COURT.—Objection overruled. It is preliminary.

(Testimony of L. E. Loomis.)

Q. What property did that cover?

A. He had, I think, $2,000 on the building and fixtures and $2,000 on the stock.

Q. That was his saloon at Long Beach?

A. Yes, sir.

Q. When did that policy expire?

A. The last policy that I had expired on June 16th, I think, was the date of them.

Q. Did he keep them until that time?

A. No, sir. I received them from Mr. Black June 10th, I think, June the 8th or 10th, 1912, about six days before they expired.

Mr. LANGHORNE.—Did you have written communications?

A. He wrote me a letter—(interrupted).

Mr. LANGHORNE.—I object to any testimony concerning it unless the written communication is produced.

The COURT.—I do not understand that this question went to anything more than the time, if he had any recollection of the date, but as to the contents of the letter the objection will be sustained.

Q. How was this sent to you, by mail or otherwise?

A. By mail.

Q. Did you ever have a talk with Mr. Black during the month of May, 1912, in regard to increasing his insurance?

A. I do not remember positively the month. It may have been April or it might have been May, but he asked me what it would cost, what would be the rate on $8,000 insurance. [256] He did not specify,

(Testimony of L. E. Loomis.)

however, any particular amount on the building or stock, I do not believe.

Q. Did you tell him what the rate was?

A. I told him it would cost $210.

Q. Did you have any further conversation in regard to the stock?

A. I had no conversation with him at the time in regard to his stock, no more than he said that he was intending to increase his insurance.

Q. I will ask you whether or not he stated how much he wanted on the stock and how much on the building?

A. I do not remember. I could not say.

Q. How was this other $4,000 divided up, did you say?

A. There was $1,500 on the building; $500 on the contents—that is on the stock—on the back bar and fixtures, and $2,000 on the stock of wines and liquors and cigars.

Q. What did the fixtures consist of?

A. Bar, back bar, the fixtures if I remember rightly, including glassware and things movable and immovable in the building, chairs, etc.

Q. Did you ever have any conversation with him about disposing of the stock and getting out of the neighborhood?

A. Well, Mr. Black has said a number of times that his wife was opposed to his business and that he was going—and he would like to get out of the business, something of that kind, at different times, I do not remember just when this statement was made to me.

(Testimony of L. E. Loomis.)

Q. Did you have any of that kind of a conversation at or about the time of this insurance talk? [257]

A. What is that?

Q. Did you have any conversation at or about this time of the talk of getting the new policy?

A. I could not say, no, sir. I used to see Mr. Black quite often, every few days in fact.

Q. Did you have any conversation with him about his having to have the goods in case that he took $5,000 insurance?

A. About having his stock insured for $5,000?

Q. Yes.

A. No, sir. No, I could not say positively to that, I could not say.

Q. Did you have any conversation with him about this time in which, at the time that he applied for this insurance in which you stated you were from Missouri and that he would have to show you the stock?

Mr. LANGHORNE.—I object to that as leading and as putting answers in the witness' mouth.

Objection overruled.

Question read.

A. Why, he asked me if I would insure it for $8,000, the stock and fixtures, and I told him that I would insure him providing he had the goods or the value there, that the companies were from Missouri and had to be shown, if he had the goods I would insure him for $8,000, and he answered that he did not know just what he had, that he was selling all the time, and I told him it was time he was finding

(Testimony of L. E. Loomis.)

out; if he did not know what he had he had better find out. I do not believe I had any more conversation with him after that time.

Q. You think there was nothing said after that? [258]

A. No, sir, I do not think I saw him after that time.

Q. The only business transaction you had after that was the receipt of your policy by mail?

A. Yes, I am sure. It was the 10th of June that I received the policy back. At least, the letter was mailed from Long Beach on the 10th of June.

Cross-examination.

(By Mr. LANGHORNE.)

Q. Mr. Loomis, if I understand you correctly, at the time he spoke to you about $8,000 insurance, he never specified how he wanted it divided, did he?

A. No, sir, he did not say.

Q. How large a hotel building did he have?

A. Well, it was not a large building, probably fourteen or fifteen rooms upstairs, something like that.

Q. He said it was twenty-two rooms.

A. Well, it might be, I could not state positively. It might be.

Q. He had a warehouse also, did he not?

A. Yes, I think there was a couple of buildings that Mr. Black had goods stored in.

Q. He had a couple of buildings that he had goods stored in besides his saloon?

A. He might have—I never examined his goods or anything of that kind but I am pretty sure—one of

(Testimony of L. E. Loomis.)

them had been a barn where he kept a horse at one time.

Redirect Examination.

(By Mr. COLE.)

Q. This $8,000 had something to do with the hotel?

A. No—(interrupted). **[259]**

Mr. LANGHORNE.—Just a minute. I object to that.

Objection sustained.

Q. What property did he want this $8,000 on?

A. I understood him to say the saloon building and contents because I understood that he had the small building and the boarding-house or hotel insured, but I never insured it. He asked me what it would cost to insure it, the boarding-house, for $3,000 about that time too.

Q. Did he give any reason why your policy was cancelled—was there any reason given to you?

A. In his letter?

Q. Yes.

A. He stated in that letter—(interrupted).

Mr. LANGHORNE.—Just a minute. I object to that.

Q. Have you got the letter?

A. No, I have not got it here.

Q. Do you know where it is?

A. I have it at my place.

Q. You have it on file, have you?

A. Yes, sir.

(Witness excused.) **[260]**

[Testimony of F. A. Hazeltine, for Defendant.]

F. A. HAZELTINE, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLE.)

Q. What is your name? A. F. A. Hazeltine.

Q. Where do you live, Mr. Hazeltine?

A. South Bend.

Q. What occupation are you in?

A. I am a country editor.

Q. Edit a newspaper? A. Yes, sir.

Q. How long have you lived in South Bend?

A. Twenty-two years.

Q. Do you know William Black? A. Yes, sir.

Q. How long have you known him?

A. Ever since he came to the country there, I think it must be some fifteen years, close to that.

Q. Did you ever know him anywhere else?

A. No, sir.

Q. Do you know what his general reputation is for character in Long Beach, in Pacific County? Just answer that yes or no.

Mr. LANGHORNE.—For what?

Mr. COLE.—General reputation for character.

Mr. LANGHORNE.—I object to that.

Objection sustained.

Mr. COLE.—That is the language in which the Supreme Court states a matter like that should be raised. I do not see what the objection could be. **[261]**

(Testimony of F. A. Hazeltine.)

The COURT.—You are seeking to impeach a witness?

Mr. COLE.—Yes, sir.

The COURT.—As I understand it, the form of that question would be whether he was acquainted with his general reputation in the community in which he lives for truth and veracity.

Mr. COLE.—That is one form. I think the other is a form according to the Supreme Court of the State of Washington.

Objection sustained.

Q. Are you acquainted with the reputation of Mr. William Black in the community in which he lives for truth and veracity?

A. Yes—(interrupted).

Mr. LANGHORNE.—Just a minute. When?

The COURT.—Fix the time.

Q. During the past fifteen years since you have known him? A. Yes, sir.

Q. You may state then what it is.

A. Why, I regard it as very poor.

Mr. LANGHORNE.—For what?

A. For truth and veracity.

Q. Do you know what the general reputation of Henry Kayler is for truth and veracity in the community in which he lives? A. Yes, sir.

Q. How long have you known him?

A. I have known him for about twenty years.

Q. What is his general reputation for truth and veracity? A. It is not very good.

Q. Did you ever have any talk with Mr. Black con-

(Testimony of F. A. Hazeltine.)

cerning his [262] disposing of his stock of goods at Long Beach?

A. Why, I used to be quite friendly with Mr. Black; I am personally acquainted with him now, excepting his business; I have always opposed the business, and when he first went into the saloon business, why, I had a talk with him about it, he being a brother Mason, and he knew my sentiments towards the saloon business, and he assured me he was only in it because he had been caught with a mortgage on the stock and that he did not intend to stay in it. He remained in it, though,—that was in Ilwaco,—as long as he could get a license there, and then he moved to Long Beach,—(interrupted).

Mr. LANGHORNE.—I move to strike out that last part.

The COURT.—Motion granted. You are not answering the question.

Q. What, with reference to his disposing of the stock at Long Beach?

A. After he moved to Long Beach, he assured me there—(interrupted).

Mr. LANGHORNE.—I object to that as immaterial.

The COURT.—Objection overruled.

A. (Continuing.) That he intended to dispose of the stock as fast as he could, that he did not want to remain in the business and was simply getting rid of the stock that he had on hand.

Q. About when was that, did you say?

A. I should say that was about a year after he

(Testimony of F. A. Hazeltine.)

moved to Long Beach, about 1909. [263]

Cross-examination.

(By Mr. LANGHORNE.)

Q. You say you are friendy with Mr. Black?

A. Personally. I have nothing against him personally, simply do not like his business.

Q. Do you associate with him?

A. I did as long as he would allow me, but the last few years since I have been working for local option, he did not want to associate with me.

Q. You have local option fights in Pacific County whenever you fellows haven't anything else to do?

A. Yes, sir.

Q. And when there is nothing to do on that line you are indicting the legal fraternity?

A. Yes, and winning out, too.

Q. A busy community down there?

A. Yes, we have a good time there.

Q. In court most of the time. Are you friendly with a man you say whose reputation for truth and veracity is bad? A. Why, in a social way.

Q. Who did you ever hear say his reputation for truth and veracity was not good?

A. It is quite common talk there.

Q. Give us the name of someone.

A. Very well, there is N. R. Whitcomb.

Q. Who is he?

A. He lived in Ilwaco a long while, in fact his legal residence is still there. He is now the deputy county assessor.

Q. Is he a local optionist too? [264]

(Testimony of F. A. Hazeltine.)

A. I think he voted dry, yes.

Q. How far is South Bend from where you live,—from Long Beach?

A. About twenty-five miles, I should judge.

Q. How long are you over at Long Beach?

A. During the summer-time, especially; I am there on an average of at least once a month, oftener even than that; I circulate around the country pretty freely.

Q. Circulate around in support of the local option movement?

A. No, sir, newspaper. "South Bend Journal" and local option on the side.

Q. You have given the name of one man you have heard talk about the reputation of William Black for truth and veracity. What others?

A. E. A. Seaborg. He was born in Ilwaco, County Clerk.

Q. He is a local optionist?

A. I do not know how he did vote.

Q. He is doubtful then? A. Yes, sir.

Q. Who else did you hear speak about Mr. Black's reputation for truth and veracity?

A. I do not recall just now. I did not take a list of them down.

Q. You heard but two people speak about it and yet you can swear his reputation for truth and veracity in that community is bad?

A. Yes, sir. I did not take note of all the people who told me that.

Q. You would damn a man's reputation for truth

(Testimony of F. A. Hazeltine.)

and veracity before this jury because you have heard two men say it [265] was bad?

A. No, sir. General talk for years. I had no idea of being called as a witness and don't want to be a witness now.

Q. You did not miss the opportunity?

A. The gentleman with the gray suit pumped me before I knew what he was up to or he would not have had me here.

Q. You say Henry Kayler's reputation for truth and veracity is bad, too? A. Yes, sir.

Q. He is the fellow the insurance company appointed as agent at Long Beach? A. Yes, sir.

Q. You think they would appoint a man whose reputation for truth and veracity is bad?

A. I guess they did.

Q. You say you are friendly with Mr. Black?

A. Yes, due to a peculiar reason: I traveled in South America as newspaper correspondent years ago, and Mr. Black used to be a locomotive engineer, and he had been in places where I was and I used to drop into his saloon and we would swap yarns about South America and talk bad Spanish, and his wife could not talk any English, and I used to go over and talk to her because the poor woman could not hardly talk to anybody else but her husband.

Q. Did Mr. Black ever threaten you and your newspaper for a libel suit?

A. Never directly; I heard he was.

Q. You published an article that you had to admit was not [266] true?

(Testimony of F. A. Hazeltine.)

A. That he sold liquors to minors—(interrupted).

Q. I am not asking about that. I am asking you if you did not publish an article that he applied for a saloon license and could not get one and then you afterwards found out it was not true?

A. I have not found out that it was untrue.

(Witness excused.) [267]

[Testimony of Z. B. Brown, for Defendant.]

Z. B. BROWN, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLE.)

Q. What is your name? A. Z. B. Brown.

Q. Where do you live? A. South Bend.

Q. How long have you lived there?

A. I think I have lived in South Bend from sixteen to eighteen years, probably.

Q. Did you ever hold any official position there?

A. Yes, I am the County Assessor.

Q. Did you ever go over to Long Beach?

A. Yes, sir.

Q. How often?

A. Oh, well, three or four times a year, maybe more than that, sometimes.

Q. Did you ever go into Mr. William Black's saloon? A. Yes, sir.

Q. You know Mr. Black, do you? A. Yes, sir.

Q. How long have you known him?

A. Practically ever since he came into the country. He was an engineer on the road when I first knew him.

(Testimony of Z. B. Brown.)

Q. Did you ever have any talk with him about his stock of goods? A. Yes, I had a talk with him.

Q. When was the last conversation?

A. Well, it was in 1912. I could not tell the date. It was [268] in the assessing season, in March. I had a talk with him; after the deputy had assessed him I had a conversation with him.

Q. You had a conversation with him as to the amount of his stock?

A. Relative to his assessment.

Q. Did he state anything to you as to the value of the stock that he had on hand?

A. He gave me to understand that he gave him a fair assessment, that he didn't have much stock on hand at the time.

Q. Did you have any conversation with him about what he was going to do with his stock?

A. No, sir, I do not recall any conversation about what he was going to do with it.

Q. What, if any value did he place on his stock at that time?

A. Well, he had no value. I do not know that he placed any particular value to me at that time about his stock, only that he had the assessment at that time and we were talking about his assessment at that time.

Q. What was the assessment, do you remember?

Mr. LANGHORNE.—Did you make it?

A. No, sir, I did not make it myself. It was turned in to me by one of my deputies.

(Testimony of Z. B. Brown.)

Mr. LANGHORNE.—I object to that as incompetent.

The COURT.—Objection sustained.

Mr. COLE.—I wish to offer in evidence the certified copy of Mr. Black's detail list of personal property as assessed for the years 1912 and 1910.

Mr. LANGHORNE.—I object to that as not such an instrument as can be certified to under a law of this State— [269]

Mr. COLE.—The statute provides that any instrument in the custody of an official may be certified to and introduced in evidence.

The COURT.—Objection sustained.

Exception allowed.

Mr. COLE.—The statute on that is pretty broad. It states that any instrument in the custody of a public official—(interrupted).

The COURT.—That is the copy of the assessment at which his property was assessed?

Mr. COLE.—Yes. This is a detail list as signed and subscribed by him personally, and if I had Ballinger's Code here I could call your Honor's attention to that statute. It is very broad. It says that a certified copy of any public record in the custody of any county, city or State official, may be introduced in evidence.

The COURT.—I will change the ruling, but I will instruct the jury at the same time that what property is assessed at is not evidence of value of the property. This jury is here to determine the reasonable cash market value of these goods, but, it is a mat-

(Testimony of Z. B. Brown.)

ter of such common knowledge that property is assessed below its valuation, and even where the property is assessed, and statements made by the owners of the property,—that it is not such a satisfactory evidence of value as to be followed.

Mr. COLE.—We do not contend it is conclusive. Our contention is that it is a circumstance. For instance, the assessor probably assessed personal property at a certain per cent,—I understand that in this year it was assessed at sixty per cent of its valuation. **[270]**

Whereupon said detail lists were admitted in evidence and marked Defendant's Exhibit "N" of this date.

Q. Now, I will ask you whether or not you went over this assessment with Mr. Black, and what, if any, conversation you had with him relative to running his stock down?

A. I did not go over the assessment with Mr. Black. I did not have the assessment when I was talking with Mr. Black at all. Mr. Black and I were friends and I think he opened up the conversation himself about the assessment, and we talked over the assessment in a general way.

Q. What, if anything, was said about the value of his property at that time?

A. He gave me to understand that he had given him a fair assessment, that his stock was low. They all do that too, as a general thing.

Q. Did you make any comparison between his stock of that year and previous years?

(Testimony of Z. B. Brown.)

A. No, sir, I did not that I know of.

Q. The only words used was that his stock was low at that time?

A. Yes; he showed me a barrel or two that didn't have much liquor in them, tipped one up and so on.

Q. How many did he call your attention to?

A. I do not know. He had a lot of barrels there and we talked in a general way and he gave me to understand that he had given in a fair assessment for the stock that he had.

Cross-examination.

(By Mr. LANGHORNE.)

Q. What basis did you assess personal property on in Pacific [271] County last year?

A. Sixty per cent.

Q. Sixty per cent of—(interrupted).

A. Sixty per cent of the full value.

Q. It says, "seventy per cent," what does that mean? A. That is 1910.

Q. I suppose this was last year's?

A. No, sir, that is 1912, that seventy per cent is the part of the sheet,—less forty per cent you see here (indicating), I took forty per cent off the total value.

Q. Less seventy per cent here (indicating)?

A. That is the 1910.

Q. And that you assessed at seventy per cent?

A. No, sir; in 1910 and 1911 it was assessed at thirty per cent and in 1912 it was assessed at sixty per cent.

Q. I believe you said everybody that had personal

(Testimony of Z. B. Brown.)

property assessed always thought that they gave it in pretty high? A. Yes, sir.

Q. Were you county assessor when they used to assess moneys and mortgages and credits?

A. I believe I was deputy assessor then.

Q. How much did you find in Pacific County then?

A. I remember finding $103 once.

(Witness excused.)

[Assessment for 1912.]

Mr. COLE.—The 1912 assessment reads as follows: "Detail list of personal property of William Black of Pacific County, Washington. A schedule of the numbers and amount of all personal property in the possession or under the control of himself belonging to William Black on the first day of [272] March, 1912, listed by himself of the town of Long Beach, County of Pacific and State of Washington, as required by the General Revenue Law now in force in this state. Poultry, one dozen, $5.00. Sewing-machines, 1, $5.00. Household furniture, including clocks, rugs, gold and silver plate, paintings, statuary, engravings, etc., $100.00. Office furniture, safes, typewriters, adding machines, cash registers, etc., $50.00. Stock and furniture of sample-rooms, saloons, etc., $600.00. Aggregate value of personal property as equalized by County Board, $760.00. Aggregate value of exemptions under section 5 of Law, less forty per cent, $304.00. Aggregate value of taxable property as equalized, $456.00. Aggregate value of personal property as returned by the

assessor, exempt, $300.00. Aggregate value, $156.00. State of Washington, County of Pacific, ss. I, William Black, do solemnly swear that I am a resident of the County of Pacific; that I have read and know the contents of the within and foregoing detail lists, and the same contain full and correct statements of all property subject to taxation in this County, which I or any firm of which I am president, cashier, secretary, managing agent, owned, claimed, possessed or controlled on the first day of March, 1912, at 12 o'clock, meridian, and which is not already assessed for said year; and that I have not in any manner whatever transferred or disposed of any property or placed any property out of said County or my possession for the purpose of avoiding any assessment upon the same or of making this statement. (Signed) William Black, Residence Long Beach. Postoffice, Long Beach. [273] Subscribed and sworn to before me this 13th day of March, 1912. (Signed) Z. B. Brown, County Assessor by Wm. S. Shagren, Deputy." Now, here is a detail list of personal property for 1910 and it is in the same form as the other one. "One horse valued at $25.00. One buggy at $10.00. One piano at $50.00, one sewing-machine, $5.00, household furniture, $100.00. Stock and furniture of sample-rooms, saloons, etc., $1,410.00. Aggregate value of personal property as returned by Assessor, $1600.00, less seventy per cent, $910.00. Aggregate value of personal property assessed, $1300.00. Aggregate value of exceptions under Sec. 5 of law, $300.00. Aggregate value of personal property assessed for taxation, $390.00. And

it is subscribed and sworn to in the same manner as the other one, on the 20th day of March, 1910, H. A. Peeples, County assessor by Theo Jacobson, Deputy.'' That was the 20th day of March, 1910, and the other was the 13th day of March, 1912, one being for $600 on the stock and furniture of sample-rooms, etc., and for 1910 it was $1,410. [274]

[Testimony of William S. Shagren, for Defendant.]

WILLIAM S. SHAGREN, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLE.)

Q. What is your name?

A. William S. Shagren.

Q. Where do you live?

A. Nahcotta, Washington.

Q. How long have you lived there?

A. Thirty-three years.

Q. What if any position do you hold at the present time?

A. I do not hold any at the present time, but I have been deputy assessor for the last five years.

Q. Were you the deputy assessor in 1912?

A. Yes, sir.

Q. Do you know Mr. William Black?

A. Yes, sir.

Q. Did you assess his property during 1912, or the spring of 1912? A. Yes, sir.

Q. You made the assessment here that is on this exhibit for the year 1912, did you? I show you De-

(Testimony of William S. Shagren.)

fendant's Exhibit "N," detail tax statements for 1910 and 1912, attached together. The first one is for 1912. I will ask you whether or not you are the one who made that assessment?

A. Yes, I made that assessment.

Q. Where were you at the time you assessed that property? A. In the saloon.

Q. At Long Beach? [275] A. Yes, sir.

Q. Was Mr. Black there? A. Yes, sir.

Q. What, if any, conversation did you have with him about his stock at that time?

A. Well, I told him I wanted a fair valuation for what he had.

Q. What did he say?

A. Well, we went around and he tapped the barrels for me.

Q. What did he say about the amount that he had —of the amount in the barrels?

A. Well, he said at that time that he was afraid that this place was going dry and he was letting his stock run down.

Q. What did he use in tapping the barrels, if anything?

A. I did not notice what he had in his hand at the time.

Q. What was his object in tapping the barrels?

A. I suppose to see how much liquor was in them. That was the only object in view.

Q. How did you arrive at the assessment of $600?

A. After we went around and looked over the stock, and I do not know whether it was he that stated

(Testimony of William S. Shagren.)

that, I am pretty sure that he did, and we both agreed that would be a fair value.

Q. What did that include besides the liquors and cigars on hand, if you know?

A. That would be where it says, "Stock" on the list.

Q. That included the furniture in the saloon?

A. No, sir, I think the furniture comes in under a different heading. [276]

Q. The list says stock and furniture of sample-rooms, saloons, etc. A. That reads that way there?

Q. Yes.

A. And cash register and one thing and another—(interrupted).

Q. Yes, the cash register and safe were assessed at $50. A. Yes, sir.

Q. Did that include the bar?

A. I suppose it would, yes, sir.

Q. And that conversation was on the 13th of March, the date that these affidavits are given there (indicating)?

A. Whenever the assessment was taken, yes, sir.

Q. What did you notice with reference to the barrels of liquor in the front room at that time as to their condition, as to being full or otherwise?

A. Well, I have not had much experience in tapping barrels, but—(interrupted).

Q. Do you know how a barrel sounds when it is full and how it sounds when it is empty?

A. Yes, sir. I do not think there were many of

(Testimony of William S. Shagren.)

them that were full. In fact, most of them sounded hollow to me.

Q. What did you say was the conversation in regard to local option?

A. He said he was afraid that the town was going dry.

Q. Was that given as a reason for running the stock down? A. I suppose it was, yes.

Q. Did you have any conversation as to what percentage of assessment was being made at that year?

A. I do not remember as to that.

Q. What percentage were you making assessments as to that [277] year? A. Sixty per cent.

Q. Do you know what Mr. Black's reputation, generally, for truth and veracity is down there in the neighborhood in which he lives?

A. Well, I do not know much about that only what I have heard and I do not go much on hearsay. I had very little business with him himself.

Q. Could you state you are familiar with it as it stands in the community? A. How is that?

Q. Could you state you are familiar within, enough, to know what it was?

A. Well, only from what I have heard.

Q. How extensively have you heard,—to what extent in regard to being general or just to a small extent?

A. Well, I don't know exactly how—(interrupted).

The COURT.—You were not asked to tell what you have heard but whether you have heard enough

(Testimony of William S. Shagren.)

so that you feel you know what his general reputation for truth and veracity is in the community in which he lives?

A. Well, as to that, I will say that it is not very good.

The COURT.—You were not asked that.

Mr. COLE.—This is preliminary. You may answer as to whether you know what it is. Do you think you do? A. Yes, sir.

Q. What is it then?

A. Well, not very good. **[278]**

Cross-examination.

(By Mr. LANGHORNE.)

Q. What is his reputation for square dealing down there with his brother men?

A. I do not know. I never had much dealing with the man.

Q. What is his reputation for square dealing?

Mr. COLE.—I object to that as not proper cross-examination.

Objection overruled.

A. I could not say as to that.

Q. What is his reputation for honesty?

A. Well, I could not say anything as to that.

Q. Did you ever hear anything against it, against his honesty? A. Well,—no.

Q. You have got two bitter factions down there at Long Beach, have you not?

A. Well, I do not know. I do not live there.

Q. Where do you live? A. Nahcotta.

Q. How far is that from Long Beach?

(Testimony of William S. Shagren.)

A. About ten or twelve miles.

Q. You know perfectly well they have two bitter factions at Long Beach?

A. They may have—(interrupted).

Q. You know that from general reputation and hearsay, don't you?

A. Yes, I guess—(interrupted).

Q. Who are these men who talk about Mr. Black? They are not his friends, are they?

A. I would not say they were.

Q. Who did you ever hear say that his reputation for truth and [279] veracity is not good?

A. I do not know as I can recall anyone. It is in a general way.

Q. How long have you been deputy assessor?

A. Three years.

Q. You generally find that as the assessment time rolls around, you find their stock greatly shrunken?

A. They all put up a pretty stiff talk, yes, but I always try to get all I can get.

Q. How far is Long Beach from South Bend?

A. Oh, it is about forty miles.

(Witness excused.)

Recess. [280]

[Testimony of F. X. Marks, for Defendant.]

F. X. MARKS, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLE.)

Q. What is your name? A. F. X. Marks.

(Testimony of F. X. Marks.)

Q. Where do you live?

A. Long Beach, Washington.

Q. How long have you lived there?

A. About eight years.

Q. Are you acquainted with Mr. William Black?

A. Somewhat, yes.

Q. What if any position, official position, have you held down there?

A. I served as justice one term, deputy sheriff another term and—that is all.

Q. How old are yòu, Mr. Marks?

A. Sixty-two.

Q. Now, are you familiar, with the general reputation for truth and veracity of William Black in that community? A. Well, I have got my opinion.

Mr. LANGHORNE.—I move to strike that out.

Motion granted.

Q. Just answer the question yes or no. Answer yes or no whether or not you know what it is.

A. Well, in a way, yes, sir.

Q. Do you know what it is around among the people in general? Answer yes or no.

A. I think I do, reàsoning from the petition that was circulated and signed against him. [281]

Q. Now, what is his reputation for truth and veracity as to being good or bad?

A. That is a kind of a delicate question. He is given a good deal to—(interrupted).

The COURT.—It can be answered. The question is whether it is good or bad, if you know. Answer it, say so, if you know, if you do not know, say so.

(Testimony of F. X. Marks.)

A. Well, I do not think it is very good.

Q. Do you know who circulated that remonstrance against his license being renewed?

A. I think Mrs. Papa.

Mr. COLE.—I wish to offer this remonstrance in evidence.

Mr. LANGHORNE.—I object to that as absolutely immaterial and incompetent and irrelevant and as having no bearing on the case.

The COURT.—For what purpose do you offer it, Mr. Cole?

Mr. COLE.—It is for the purpose of showing the motive.

The COURT.—Objection sustained. It has been shown that there was a remonstrance and that he knew of it.

Q. Do you know Henry Kayler, Mr. Marks?

A. Yes, sir.

Q. How long have you known Henry Kayler?

A. Oh, seven or eight years.

Q. I will ask you if you know what Henry Kayler's reputation is for truth and veracity in that community? A. I do not think it is very high.

Q. Answer yes or no if you know what it is.

A. Well, I will answer yes, that is, I think I do.

Q. Having answered yes, you may state what his reputation for truth and veracity is? [282]

A. Not very good.

Q. Do you happen to know anything about the amount of stock Mr. Black had at the time of the fire? A. No, sir.

(Testimony of F. X. Marks.)

Q. You are not familiar with that?

A. No, sir.

Q. When was the last time you were in his saloon?

A. That is a long time ago. It must be, oh, probably a year or more before the fire.

Q. You were not in his saloon just prior to the fire?

A. No, sir.

Cross-examination.

(By Mr. LANGHORNE.)

Q. Were you born in the United States?

A. Yes, sir.

Q. Did you ever leave the United States?

A. Yes, sir.

Q. You have taken the oath of allegiance in another country? A. Yes, sir.

Q. What country? A. Canada.

Q. And then came back to the United States.

A. Yes, sir.

Q. How long have you been down at Long Beach?

A. I think it was eight or nine years last February.

Q. What have you been doing down there the last three or four years? A. Mill work principally.

Q. What kind of mill work?

A. Setting boilers. [283]

Q. Do you know what reputation consists of?

A. I do, yes.

Q. What is it?

A. The proof of the pudding is in the eating of it if that will do for an answer.

Q. Do you know what reputation consists of? Do you know how a man's reputation is made or

(Testimony of F. X. Marks.)

ruined? A. Yes, sir.

Q. You are not friendly with Mr. Black?

A. Not particularly unfriendly. We had a little bit of trouble but I do not,—(interrupted).

Q. Are you a local optionist?

A. Well—not exactly.

Q. Who did you ever hear say Mr. Black's reputation for truth and veracity was not good?

A. Well, himself, listening to his narratives.

Q. Anybody else?

A. Oh—possibly—yes, that petition was considerable evidence to satisfy me.

Q. Do you mean to say that a petition circulated and asking the county commissioners not to grant a saloon license for a man is evidence of his reputation for truth and veracity?

A. When it belongs to a certain individual I certainly do.

Q. Answer the question, do you believe because—(interrupted).

A. Yes, I do.

Q. You believe that the fact that if people sign a petition against a man, asking the county commissioners not to grant him a saloon license, that would be evidence that the man did not have a good reputation for truth and [284] veracity?

A. If you did not sign it for that reason I would not think much of your judgment.

Q. Suppose I signed it for the reason that I did not want a saloon in the community, and that I did not have anything against the man himself. Suppose

(Testimony of F. X. Marks.)

some of the signors did not know the man at all but were opposed to liquor on general principles, do you think that would be evidence against the man's general reputation for truth and veracity?

A. Not necessarily.

Q. How is it that you form your opinion that Mr. Black did not have a good reputation for truth and veracity—is it because somebody signed a petition against his running a saloon?

A. Well, I had a little reason aside from that.

Q. If somebody down at Long Beach don't act as you do, you say he has not a good reputation—that is it, is it not? A. No, sir.

Q. You are not friendly with Mr. Henry Kayler, are you? A. I could not say that I am very.

Redirect Examination.

(By Mr. COLE.)

Q. Did you help circulate this petition? Did you take any part in circulating the petition?

A. I think I took part in circulating a remonstrance against his appointment as postmaster at one time.

Q. Who was that against?

A. Against his appointment as postmaster.

Q. Against who? **[285]** A. Henry Kayler.

Q. I had reference to the petition here. Did you help circulate the petition against Mr. Black?

A. No, sir.

Q. You were asked on cross-examination about going over to Canada. What was the object of that trip?

(Testimony of F. X. Marks.)

Mr. LANGHORNE.—I object to that as immaterial.

No ruling by the Court.

A. Simply to make a living and get land for my boys.

Q. Did you take out your papers when you came back?

A. I took up my—made my declaration just twenty-six hours after I acquired citizenship in Canada. Just as soon as I got across the line, I was compelled to acquire citizenship in Canada in order to make final proof on the homestead.

Q. As soon as you came back here you took out your papers? A. Yes, at Blackfoot, Idaho.

Q. (By Mr. LANGHORNE.) Then your only object in declaring yourself to be a citizen of Canada was to acquire a hundred and sixty acres of land?

A. Certainly.

Q. (By Mr. COLE.) Did you ever serve in the army for the United States Government?

A. I did. I have been scout on different occasions, for the Fifth Cavalry, well in '80 and '81 and in '68 also.

Q. What wars were those?

A. Indian scraps, all of them.

(Witness excused.) [286]

Mr. COLE.—I wish to read the deposition of Mr. Peter Stoller.

The COURT.—Taken under stipulation?

Mr. COLE.—Yes.

The COURT.—Proceed.

[Deposition of Peter Stoller.]

Mr. COLE.—(Reading:)

"Q. Where do you live, Mr. Stoller?

A. I live at Long Beach, Washington.

Q. How old are you?

A. Fifty years—very near fifty-one.

Q. What is your occupation?

A. Well, at the present time, farming.

Q. And you are now on your way to The Dalles?

A. Yes, sir.

Q. And you speak of going to The Dalles to-night, do you?

A. No, not until Monday now, on account of the train.

Q. How long have you lived at Long Beach?

A. A little over five years.

Q. Are you acquainted with William Black?

A. Yes, sir.

Q. How long have you known Mr. Black?

A. I have known him a little over five years, also. I got acquainted with him, one among the first in the country.

Q. Are you familiar with Black's saloon at Long Beach, Washington, prior to the time it burned?

A. When it burned?

Q. Yes. A. I know the location of it.

Q. Have you ever been in his saloon?

A. Yes, sir.

Q. Now, how long prior to the fire were you in there?

A. I was there about at least four months before

(Deposition of Peter Stoller.)

he was burned, not since then.

Q. I will ask you whether or not you noticed his stock of liquors when you were in there.

A. I bought liquor there time and again; I also drank over the bar.

Q. What kind of liquor did you buy from him?

A. I bought one gallon of wine to my knowledge, Port wine, and I bought to my certain knowledge, I bought three bottles at different times—that is one at a time—of Old Crow whiskey, and **[287]** I bought one bottle of Green River Whiskey.

Q. Where was this Old Crow taken?

A. Taken from?

Q. Yes. A. Out of a barrel.

Q. Where was the Green River taken from?

A. Out of a barrel, right out of a faucet.

Q. I will ask you whether or not Mr. Black sold much liquor out of a barrel?

A. All that I ever bought of him was out of a barrel.

Q. And do you know how long he had the Old Crow there?

A. He had some there the year before he burned up, and the year after that, 1911 and 1912—that is the same year he burned up you might say, that would be in 1911, he had one barrel of extra good liquor to my knowledge. I don't know whether he had any more or not but he told me of one barrel that was extra good. In fact, it was good for he sold some of it for twenty-five cents a drink and he asked as high as $2 a bottle for the liquor.

(Deposition of Peter Stoller.)

Mr. BRUMBACH.—I would like you to qualify the size of the bottle.

A. Ordinary quart bottle, he might have made a little reduction to an old settler.

Q. How many barrels did Mr. Black have in his saloon—of liquor; how many barrels of liquor did he have in his saloon?

A. I could not tell you exactly how many, I know there was quite a number there, there must have been eight or ten at least in the bottom tier and about six or eight in the top tier.

Q. What was the condition of those barrels as to their being full or tapped?

A. I could not say.

Q. I will ask you whether or not they had any faucets in them.

A. I could not speak there was faucets in all of them, but there were faucets in most of them.

Q. And about when was this that you saw that number of barrels in his [288] saloon?

A. That was right up to the time I left, that was in January last, about 1911, I think.

Q. January, 1912, wouldn't it be?

A. 1911 or 12—it was about four months prior to the time he was burned up, I could not tell exactly.

Q. I will ask you whether or not he had any whiskey that he sold cheaper than the price you have mentioned.

A. Well I am not a man to drink poor liquor, I don't drink much liquor and a bottle always done me never less than two weeks and sometimes two months.

(Deposition of Peter Stoller.)

Q. Did he have any cheaper liquor to your knowledge?

A. He told me one time that he had some liquor he sold for a dollar a bottle.

Q. I will ask you, Mr. Stoller, whether or not you are familiar with the general reputation of William Black in that community at Long Beach, Washington, for character.

Mr. BRUMBACH.—I am going to interpose an objection there; objected to by plaintiff for the reason that it does not specify what kind of character."

Mr. LANGHORNE.—I insist upon the objection.

The COURT.—On account of this being a deposition—you say you had a ruling from the Supreme Court—(interrupted).

Mr. COLE.—Yes, I have the citation here.

The COURT.—You may pass that but hand up your authority to me later. I will not permit the answer to go in. I want to read your authority first.

Mr. COLE.—I will pass up the questions with regard to reputation for character beginning with (reading):

"Q. Do you know what his reputation is for truth and veracity?

Mr. BRUMBACH.—Same objection."

The COURT.—Read the question. **[289]**

(Question read by Mr. Cole.)

The COURT.—That should be general reputation, but that may be preliminary. The objection will be overruled.

Mr. COLE.—(Reading:)

(Deposition of Peter Stoller.)

"A. I have never had much dealings with him in that line.

Q. Do you know what his reputation is among the people there for truth and veracity?

Mr. BRUMBACH.—Same objection."

The COURT.—Objection overruled.

Mr. COLE.—(Reading:)

"A. I could not swear to that, I could only say what I would do personally.

Q. Do you know how the people there regard him in regard to truth and veracity?

Mr. BRUMBACH.—Same objection."

Mr. LANGHORNE.—We insist upon that because the witness already said that he did not know.

The COURT.—That is asking the question if he knows?

Mr. COLE.—Yes.

The COURT.—Objection overruled.

Mr. COLE.—(Reading:)

"A. I have heard a great many of them say that they would not believe him on oath.

Q. I will ask you then whether or not that is the reputation there for truth and veracity?

A. Among a great many of them it is.

Q. Are you familiar with what the reputation of Henry Kayler is for character in Long Beach, Washington; you may just state whether you know or not?"

That is with reference to character, so I will pass that the same as the other. There is cross-examination.

Mr. LANGHORNE.—We will waive the reading of the cross-examination.

Mr. COLE.—I would like to have the cross-examination go in. [290]

Mr. LANGHORNE.—If you want to read it, all right.

Mr. COLE.—There is some testimony in regard to Frank Canarias that has been brought out. Shall I read the cross-examination relative to the character of these two people? I think I might as well pass up all of this cross-examination until to-morrow, and, if it is agreeable to the Court, we will allow that matter to go over until morning.

The COURT.—Very well. [291]

Mr. COLE.—I wish to offer in evidence the deposition of Charles Orr, taken pursuant to stipulation. It was taken at the same time as the deposition of Peter Stoller.

The COURT.—It may be admitted.

[Deposition of Charles Orr.]

Mr. COLE.—(Reading:)

"Q. Your name is Charley Orr? A. Yes, sir.

Q. Where do you live?

A. Here at Kennedy station.

Q. Is that in Portland?

A. It is about nine miles from Portland. That is were I am staying now, the address is Lents, R. R. I, Box 273-D.

Q. Did you ever live in Long Beach, Washington?

A. Yes, lived at Long Beach for nearly nine years, close to nine.

(Deposition of Charles Orr.)

Q. How old are you, Mr. Orr? A. Eighteen.

Q. When did you leave Long Beach?

A. Last June, sometime, I don't remember what date.

Q. June, 1913?

A. No, 1912. Well, we left the beach the night before the saloon burned; we were here in Portland the night the saloon burned; I remember that night.

Q. And how long prior to that time did you say you lived in Long Beach?

A. We lived there about nine years.

Q. Now, did you ever have any conversation with William Black of Long Beach, Washington, regarding any reports that his enemies were threatening to burn his saloon?

A. No, sir; the only thing was, I was talking to a woman up there—

Q. Wait just a minute, I was asking you if you had any conversation about it? A. No.

Q. Now, did Mr. Black ever have any—I will ask you whether or not Mr. Black ever spoke to you about any threats to burn his saloon? A. Yes.

Q. When was this?

A. Well, that there was in—just before he got in trouble and went away, that **[292]** is when it was.

Q. And about what year and month was that?

A. It was in the spring, I think it was May, but I ain't sure.

Q. May of what year?

A. May, 1912.

(Deposition of Charles Orr.)

Q. What was that conversation?

A. Well, he just asked me if I had heard anyone say that he was going to burn his saloon, I said 'No'; he said, 'If you do, come and let me know, and I will make it right with you.'

Q. I will ask you whether or not you ever told Mr. Black that you had heard of any threats to burn his property. A. No."

Mr. BRUMBACH.—(Reading cross-examination:)

"Q. Where did you live prior to leaving the vicinity of Long Beach? How far did you live from Long Beach, Washington, before you left there?

A. Four and a half miles, that is what they always call it. I don't know whether it was exactly that, but that is what they always called it, four and a half miles.

Q. How often were you at Long Beach from the place you lived?

A. Well, sometimes it was two or three weeks I wasn't down there, and other days would be down there nearly every day.

Q. Where was this conversation had with Black that you mentioned?

A. When he asked me that?

Q. Where was it?

A. Well, I was going past there one time and he came out and asked me if I had ever heard anybody speaking of burning his saloon.

Q. Did you know Kerlee's store in Long Beach?

A. Yes.

Q. Did you, during that time, know the lady that

(Deposition of Charles Orr.)

was clerking in the store; I can't call her name?

A. I knew the lady, but I don't know her name, and would not know it if I heard it.

Q. You would not know it?

A. No, I would not know it if I heard it. **[293]**

Q. Did you have a conversation during Black's absence mentioned, wherein you stated that Canarias' bath-house had been burned, and that William Black's place would be the next place to burn?

A. Never said anything about Canarias, but we were talking there in the store one day and I said, 'Now, everybody is against Black, and the saloon is likely to burn, isn't it'? That was all I said.

Q. To this lady? A. Yes.

Q. Isn't it a fact that that is all the conversation you had with anyone at Long Beach concerning Black's place being burned?

A. Yes. It was the only one I said anything about it.

Q. At the time you mentioned that you had this talk with Black who else was present?

A. There was somebody, but I don't know who it was. There was another fellow and I walking on the railroad track there, but I don't remember who it was or anything about it.

Q. What is your exact age?

A. I was eighteen years the 4th of July.

Q. What year?

A. What year I was born, let's see, 1895.

Q. 4th of July, this year?

A. Yes, I am eighteen this year, the 4th of July.

(Deposition of Charles Orr.)

Q. 1913? A. Yes.

Q. Were you acquainted with a man living near Long Beach by the name of F. X. Marks?

A. Yes.

Q. Did you ever have any conversation with Marks about Black's affairs in any form?

A. Liquor was all.

Q. How?

A. I say, about the liquor, knew he sold some soda water and stuff there to me, and, of course, Marks he came and wrote that down.

Q. Were you in Black's place of business?

A. On business, yes.

Q. Black's place of business, his saloon?

A. Yes, I have been there.

Q. Were you not ordered out by Black by reason of your **[294]** being a minor, in the presence of Henry Kayler? A. No, sir.

Q. Were you ever at his place of business, more than once? A. I was there twice.

Q. Did you ever get any liquor in his saloon?

A. Yes, but not for myself. I got it for another fellow; I got it for a man by the name of Jensen that worked for Gus Smith.

Q. A man by the name of Jensen?

A. He is in Astoria now, at least, I guess he is.

Q. He sent by you for it? A. Yes.

Q. Was Jensen a man over twenty-one years of age? A. About sixty-five or seventy.

Q. Isn't it a fact that F. X. Marks was a bitter enemy of Black's, and induced you to testify that

(Deposition of Charles Orr.)

you had drank liquor in his place?

A. Yes, he had me to testify I did, yes. That he was an enemy of Black, I don't know. He wrote down, I forget how many certain numbers of soda-water I had, he wrote that down—Marks he was going to use when they had the trial there, he was going to have me come as a witness, but he didn't for some cause or another.

Q. Didn't Marks interview you and request you to come back from the State of Oregon where you were about to remove and testify against Black?

A. Well, I thought he was going to get me back.

Q. I asked you if he didn't ask you to, request you?

A. No, he didn't; I don't remember; I don't think, though, he did, but I don't remember.

Q. Didn't Marks tell you that if you would come back from Crook County, Oregon, and testify against Black in a case where he was accused of selling liquor to minors, that you would get your mileage from Crook County, Oregon, to South Bend, Washington, and that it would be enough for you to have a good time?

A. Never said about a good time. **[295]**

Q. Did he not tell you you would collect mileage?

A. Yes, he told me I would collect mileage from where I went to, but he didn't say they would from up there nor he didn't say anything about—

Q. From Oregon?

A. He didn't say, but when I left I gave him my address; I suppose that is where he meant, but he didn't say from there, or he didn't say no certain

(Deposition of Charles Orr.)
place at all, he just said it will be mileage.

Q. Did you ever have a drink of intoxicating liquors in Black's saloon? A. No, sir.

Q. Did you ever represent to Black that you were over twenty-one years of age?

A. No, never spoke about my age.

Q. Did any of your companions with you there, represent that you were all twenty-one?

A. No. Well, I will tell you now, there was Christianson and Gus Smith in there, and Christianson said to Gus, he said, 'Now, he has no business in here.' Gus said, 'I know he ain't,' but he said, 'That is nothing to me.'

Q. Who said that?

A. Gus Smith. Christianson said, 'He has no business in here,' and Gus said, 'I know he hasn't, but it ain't nothing to me.'

Q. And you positively swear Black never ordered you out of that saloon in the presence of Henry Kayler?

A. Yes, sir; I was never inside the saloon when Henry Kayler was there.

Q. Do you know of boys that were your associates representing to Black that they were of age?

A. No, I never heard one say that they were of age."

Mr. COLE.—These are the redirect. (Reading:)
"Q. You stated that you had a conversation with this woman that Black's place would be the next one to go. Will you state what, if any, reason you had to make such a remark? **[296]**

(Deposition of Charles Orr.)

A. No, I didn't say that.

Q. What did you say?

A. We were just talking in there and I said, 'Well, Black's saloon is likely to burn, isn't it,' and she said, 'Yes.'

Q. Did you have any reson for stating that to her?

A. No, we were just talking among ourselves.

Q. How did you happen to state it?

A. I don't know, just got to talking about different things, I knew everybody was against Black on the Beach, that is how I came to say it, I guess.

Q. Did you have any other reason for saying it?

A. No, I never had a thing against Black or nothing in that way.

Q. Have you ever heard any threats by anybody about burning his saloon?

A. No, that there woman went over and told Black and Black says, 'Well, if you hear anybody talk about it let me know and I will make it right with you.' I told you that over there the other day, didn't I?

Q. Now, how many times did you say you went in Black's saloon? A. Twice.

Q. What was the occasion for your going in?

A. Well, one time I went in to get a note cashed, written out by Henry Kayler.

Q. How much was it? A. $50.

Q. Did Black cash it? A. No.

Q. What was the occasion for your going in the other time?

A. Well, Smith and I was—we loaned our horses

(Testimony of Charles Orr.)

to some fellows there, rented them to them, and they said they would be there, they would bring them back there, and we went there; I stood outside there quite a while and monkeyed around town and then I went over there.

(Signed) CHARLES ORR." [297]

[Testimony of Matt Phetana, for Defendant.]

MATT PHETANA, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLE.)

Q. What is your name? A. Matt Phetana.

Q. Where do you live, Mr. Phetana?

A. In Ilwaco.

Q. You live in Ilwaco, Washington?

A. Yes, sir.

Q. How long have you lived there?

A. Well, I have been in Ilwaco since '87, I came there.

Q. Since '87? A. Yes, sir.

Q. What business are you in?

A. Well, I have been doing a little of everything, but I am a carpenter.

Q. At the present time?

A. I have been doing fishing and a little carpentering.

Q. What kind of business are you now in?

A. In the carpenter business.

Q. Where are you working? A. Fort Camby.

Q. That is on the Columbia River? A. Yes, sir.

(Testimony of Matt Phetana.)

Q. Where were you working in June, 1912?

A. I was working at Ilwaco at Mr. McGowan's cannery.

Q. Is that on the Columbia River?

A. Yes, right in the town of Ilwaco.

Q. You said you were working there during the month of June? **[298]**

A. Yes, I worked there in Mr. McGowan's cannery.

Q. Did you ever see Mr. Black there towards the latter part of June?

A. Yes, one evening, I saw him.

Mr. LANGHORNE.—Where was that?

Q. Where did you see him? A. In the sawmill.

Q. Is that where you were at the time?

A. No, sir; I did not work in the sawmill, but I saw him at the time I took some lumber out.

Q. Where was he coming from?

A. I could not tell you.

Q. Did you talk to him?

A. Well, I talked to him. He said, "Good evening, how do you do," etc.

Q. About what time of the day was this?

A. That was after we quit work up at the cannery.

Q. Do you know about what time?

A. After five. We quit at five o'clock.

Q. How long after that was it?

A. Well, you see, I went into the house and had a cup of coffee and went after some lumber out there.

Q. Was it dusk yet?

A. No, sir; it was just before dark.

(Testimony of Matt Phetana.)

Q. Do you know what day it was?

A. It was St. John's Day. In the Finn language, we always celebrated that day; it was St. John's day, in the evening.

Q. Can you state about what day of the week it was?

A. I cannot remember because—(interrupted.)

[299]

Q. Was it Friday? A. No, sir.

Q. Saturday?

A. No, sir. It is supposed to be the first of the week.

Q. The first of the week, was it? A. Yes, sir.

Q. You know it was after Sunday, do you?

A. Yes, it was after Sunday. It was not Sunday because we do not work on Sunday.

Q. Was it between Sunday and Thursday?

A. I cannot remember.

Q. It was not in the latter part of the week, was it?

A. It was in the first part of the week.

Q. You stated that it was the first part of the week. Where was he going? A. Bill?

Q. Yes, where was he going?

A. He was talking with Charley Rogers. I do not know anything about his—(interrupted).

Q. What did he say?

A. He was talking about some business you know, to put up a store or something. I do not remember just what they were talking about, one thing and another. Charley is a business man—(interrupted).

Q. Did you go up the main street?

(Testimony of Matt Phetana.)

A. No, sir, I walked home, and he said, "I got some business," and he followed right behind me and I thought—I was living a little ways from the mill, and he was going over there and he had a grip in his hand and of course I did not recognize him until he said "Hello." **[300]**

Q. Do you know where he came from?

A. No, sir. He said he was going to Portland, Oregon or Astoria, or somewheres.

Q. What did he have in his hand, did you say?

A. A little hand grip, you know, suitcase.

Q. In what direction did he go?

A. In what direction?

Q. Yes.

A. Well, he was—it seems to me that he came from the dock somewhere over there. Of course I was busy. I did not take notice which way he did come from. He came right along there when I was coming with the lumber, you know.

Q. Do you know about what day in June it was?

A. St. John's Day in June.

Q. Is that in the neighborhood of the 24th or the 25th?

A. Something like that. It is the same day of the month as Christmas, excepting in leap years. It is our holiday, you know, it is St. John's Day.

Mr. LANGHORNE.—No cross-examination. I do not know what it is all about.

(Witness excused.) **[301]**

[Testimony of E. F. Woods, for Defendant.]

E. F. WOODS, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLE.)

Q. What is your name? A. E. F. Woods.

Q. Where do you reside? A. Ilwaco.

Q. Do you hold any position down there?

A. City Marshal.

Q. How long have you lived there?

A. Fourteen years.

Q. Do you know William Black? A. I do.

Q. Were you present at the fire? A. I was not.

Q. When did you first hear about it?

A. The deputy prosecuting attorney called me up I presume about daylight that morning.

Q. That was Mr. Wright?

A. That was Mr. Wright and I went out immediately.

Q. You went down there, did you?

A. Yes, sir.

Q. What did you find?

A. Well, the building was totally destroyed when I got there, still smoking; of course, it was hot, and of course I went to look for evidence to see if I could find anything for the cause of the fire, and the first thing that I got was the locks off the building and I kept them ever since. [302]

Q. Have you got them here? A. Here, yes, sir.

Q. Will you produce them?

A. They are in charge of the clerk.

(Testimony of E. F. Woods.)

Q. Now, you were acquainted with Mr. Black when he lived in Ilwaco? A. I was.

Q. And you knew him when he lived there, did you? A. I did.

Q. Do you remember when he moved his stock of goods over to Long Beach?

A. I remember the time, yes, sir.

Q. Did you see him in Ilwaco any time during the latter part of June, around about the fire at any time? A. I did not.

Q. I will ask you if you know whether or not, if you are familiar with his general reputation for truth and veracity . A. I am.

Q. Is it good or bad? A. Not very good.

Q. And are you familiar with the general reputation of Henry Kayler for truth and veracity?

A. No, sir. I *could say* as I am. You see he lives at Long Beach and I am at Ilwaco. While I was deputy sheriff I was out there but I had no business with him at all. It would be hearsay and of course those things are not reliable.

Q. Did you have any talk with Mr. Black about his stock within a reasonable time prior to the fire? [303]

A. No, sir, I do not believe I did. I think I was in there the Saturday night before the fire. I would not know—only in a general way, talking to him. Of course when I sold out the Long Beach place at the sheriff's sale, he bought that in, and he was talking about stock then and one thing and another; that is all I remember about it.

(Testimony of E. F. Woods.)

Q. You sold him the Nye property?

A. Yes. The Smith property—the old Nye property, yes.

Cross-examination.

(By Mr. LANGHORNE.)

Q. You were acquainted with the stock of goods while he ran a saloon at Ilwaco?

A. In a general way, yes.

Q. Well, testify now in a general way what the character and extent the stock of goods he had there was.

A. Well, the amount of it was—I could not say. I am no judge of the price of liquor.

Q. What was the reputation of the saloon for carrying a fine line of goods?

A. The reputation was that it was the best on the peninsula.

Q. The best that could be bought? A. Yes, sir.

Q. Were you in his saloon at Long Beach?

A. Yes, sir.

Q. How did his stock there in the saloon at Long Beach compare with what he had in Ilwaco?

A. Well, I should judge it was increased some.

Q. You executed that bill of sale? A. Yes, sir.

[304]

Q. He bought that stock of goods, wines and liquors at the sheriff's sale in 1911? A. Yes, sir.

Q. Instead of decreasing his stock in 1911 he was increasing it, wasn't he? A. Yes, to that extent.

Q. Well, now, that stock of goods brought $350 at the sheriff's sale? A. Yes, sir.

(Testimony of E. F. Woods.)

Q. Do you know anything about the value of those kinds of goods?

A. Well, I took a list of them from the bills I could find there in the place, the best I could do, and it listed up something I should judge about four hundred or four hundred and fifty dollars.

Mr. LANGHORNE.—I will offer in evidence this bill of sale on cross-examination.

No objections.

The COURT.—It may be admitted.

Whereupon said document was admitted in evidence and marked Plaintiff's Exhibit 6 of this date.

Q. September 30th, 1911, at the time he bought the goods, that was about the close of the summer season, wasn't it? A. Yes, sir.

Redirect Examination.

(By Mr. COLE.)

Q. What is this lock?

A. This is the lock off of the back door,—the bartender told me that he had—(interrupted).

Mr. LANGHORNE.—Just a minute. I object to that. [305]

Objection sustained.

Q. As far as the bartender is concerned, leave that part of it out.

A. This is the lock on the side door, side entrance of the building.

Q. Was it in this condition at the time you found it?

A. That was the condition it was in when I found it. This is the spring lock that was on the back door

(Testimony of E. F. Woods.)

leading out under the stairs.

Q. Was it in that condition when you found it?

A. Yes. And this was the lock that you found laying in the same place that that was. I presume it was also a back door; it might have been one of the doors upstairs, I would not be positive about that. And here is the lock off the front door in the same condition in which it was found, and this was the padlock off the front door. The front door also had a padlock along with the regular door lock (indicating all along).

Mr. COLE.—I would like to offer these in evidence if the Court please.

Mr. LANGHORNE.—No objections.

The COURT.—They may be admitted.

Whereupon said locks were admitted in evidence and marked Defendant's Exhibit "O" of this date.

Q. Have they been in your possession ever since you took them out of the ruins? A. They have.

Q. What do the locks indicate as to the doors having been locked at the time of the fire?

Mr. LANGHORNE.—I object to that as calling for a conclusion. **[306]**

The COURT.—Objection sustained unless it show that as a matter of expert knowledge, that he is an expert.

Mr. COLE.—I do not think it is a matter of expert knowledge. I think it is a matter anybody could determine.

The COURT.—Objection sustained.

Q. You took these to Ilwaco the day of the fire?

(Testimony of E. F. Woods.)

A. The day of the fire, yes, sir.

Recross-examination.

(By Mr. LANGHORNE.)

Q. You got there after the building was totally burned, did you?

A. Yes, still smoking, still hot.

Q. A good many people around there?

A. Well, there was not very many there at that time, not more than what would naturally gather at a fire.

Q. What time in the morning was the fire,—what time did you get there?

A. I do not know as to that. I suppose about five o'clock.

Q. How many people had been in the burning building before you got there,—do you know?

A. Nobody, because it was too hot, there were no tracks.

Q. You were not there when it was burned?

A. No, but nobody could have been there. I would have seen the tracks in the hot ashes.

Q. I am talking about the building when it was burned.

A. I do not know how many people went into the building or whether anybody went into it or not.

Q. You do not know whether anybody went through those doors just after the building took fire or not, do you? [307] A. No, sir.

(Witness excused.)

Mr. HAZELTINE.—Your Honor, may I have the

privilege of qualifying my statement while on the stand awhile ago?

The COURT.—That is between the parties, between counsel.

No objections.

Mr. Hazeltine took the witness-stand.

Mr. HAZELTINE.—On further thought, when I stated that Mr. Seaborg and Mr.—the other man, referred to Mr. Black's reputation for truth and veracity, it was more of his general reputation. I did not wish to quote them as referring specifically—(interrupted).

Mr. LANGHORNE.—I object to this stump speech.

The WITNESS.—(Continuing.) To truth and veracity.

Mr. COLE.—Wait a minute, Mr. Hazeltine.

The COURT.—The witness has finished. [308]

[Testimony of J. G. Wray, for Defendant.]

J. G. WRAY, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLE.)

Q. What is your name? A. J. G. Wray.

Q. Where do you reside?

A. Long Beach, Washington.

Q. What is your occupation?

A. Contractor and builder.

Q. Carpentering? A. Yes, sir.

Q. As such, did you ever do any building?

(Testimony of J. G. Wray.)

A. Yes, sir.

Q. How long have you lived in Long Beach?

A. I have lived there now about nineteen or twenty years.

Q. Do you know William Black? A. I do.

Q. How long have you known him?

A. I have known Mr. Black about twelve or fourteen years, something like that I think.

Q. Now, are you familiar with his saloon building?

A. Well, yes, I am quite familiar with it.

Q. Do you know what property is worth down there? A. In what respect?

Q. Buildings located in Long Beach?

A. Building locations?

Q. Buildings. Are you familiar with the values of real estate there, buildings?

A. Well, it depends on the location. **[309]**

Q. Did you have anything to do with the construction of his bar fixtures? A. I did.

Q. Are you familiar with the value of them?

A. Yes, sir, I am.

Q. What were they reasonably worth?

Mr. LANGHORNE.—I object to that as absolutely immaterial. Bar fixtures are not involved in this case.

The COURT.—Objection overruled. Gentlemen of the jury, you will understand that the plaintiff has not,—is not suing for the value of the bar fixtures, and that the defendant has accused him of burning his own building down including this stock, and causing it to be burned, and any evidence regarding a mo-

(Testimony of J. G. Wray.)

tive or purpose to be gained by burning it down, the defendant can put that in, and if his evidence shows that or witnesses show that, you may consider it for that purpose.

Question read.

Q. Go ahead and answer.

A. That is the bar fixtures?

Q. The bar fixtures, yes, sir.

A. What would you term the bar fixtures?

Q. The bar. You built a part of it?

A. I built what they term the front bar, or counter, and back bar.

Q. Are you familiar with the value of all this?

A. Yes, sir, I am.

Q. About what is the reasonable value of them?

A. Complete?

Q. Yes, complete. **[310]**

A. Well, I should say $200 or $250.

Q. Do you know what the reasonable value of that saloon building was?

Mr. LANGHORNE.—I object to that.

The COURT.—The objection is overruled. It is admitted for the same purpose and none other.

A. The real value?

Q. Yes, the reasonable value of the building.

A. Well, I think it could be contracted for in the neighborhood of $2,000.

Mr. LANGHORNE.—How much?

A. $2,000.

Q. $2,000? A. The building itself.

Q. Are you familiar with the general reputation of

(Testimony of J. G. Wray.)

Mr. Black for truth and veracity in that community?

A. Well, yes.

Q. How is it? What is it?

A. As far as truth and veracity, I do not know as I ever heard anybody say with reference to truth and veracity, it is the general talk, not good, that is all.

Mr. LANGHORNE.—I move that that be stricken out and the jury instructed to disregard it.

The COURT.—The objection is overruled, and motion denied. He has not said what it was. He said it was not about truth and veracity but it was general talk, so he has not said it was good or bad.

Answer read.

Mr. LANGHORNE.—I move that it be stricken out.

The COURT.—Motion granted. I did not hear the last part [311] of the answer.

Mr. COLE.—What do you mean as to his reputation as to truth and veracity?

A. General neighborhood talk.

Q. What would you say as to whether he is good or bad?

A. Well, some says he is good and some says he is bad.

Q. Do you know what the prevailing opinion is, general sentiment?

A. I think the prevailing would be bad.

Cross-examination.

(By Mr. LANGHORNE.)

Q. There are two pretty bitter factions in Long Beach, is there? A. Well, yes, I think there is.

(Testimony of J. G. Wray.)

Q. Mr. Black belongs to one and you belong to the other?

A. Yes, he belongs to one side and I belong to the other.

Redirect Examination.

(By Mr. COLE.)

Q. Mr. Black belongs to one faction and the rest of the people belong to the other?

A. I could not say whether all of the rest of them belong to the other side or not.

(Witness excused.)

Whereupon the further hearing of this cause was adjourned until Oct. 23, 1913, 10:00 A. M. [312]

After adjournment and after the jury had left the courtroom, the following testimony was taken under stipulation of counsel, its admissibility to be ruled upon later by the Court.

[Testimony of J. G. Wray (Recalled).]

J. G. WRAY, previously sworn.

Mr. COLE.—Do you know, Mr. Wray, the general reputation of Mr. Black as to character in the community in which he lives at Long Beach?

Mr. LANGHORNE.—I object to that as immaterial and irrelevant and incompetent.

A. His general reputation for character is not good. That is what I hear—(interrupted).

Mr. LANGHORNE.—I move to strike out the answer for the reason before given.

[Testimony of F. A. Hazeltine (Recalled).]

F. A. HAZELTINE, previously sworn.

Mr. COLE.—I will ask you, Mr. Hazeltine, if you know what the general reputation of Mr. William Black is for character in Long Beach, where he lives, in that community?

A. Yes, and furthermore I know his reputation for truth and veracity,—

Mr. LANGHORNE.—Now, never mind that. Answer the question.

Mr. COLE.—State what his general reputation for character is in that community.

Mr. LANGHORNE.—I object to that as immaterial and irrelevant.

A. It is poor. [313]

[Proceedings Had October 23, 1913, 10 A. M.]

October 23d, 1913, 10:00 A. M.

Mr. COLE.—I would like to take up now the question of the admissibility of the evidence in regard to reputation for truth and veracity.

The COURT.—Proceed.

Argument.

The COURT.—(After argument.) The objection will be sustained. That first decision you read, the matter of women who are accused of being prostitutes, the decision points out that is an exception. It has never been held that the same rule should apply to a man. That is, the Court says a woman who has become a prostitute has necessarily lost all her other good qualities before becoming a prostitute, including her ability or inclination to tell the truth.

She must necessarily be false to others when she is so false to herself as to become a prostitute. You ask what a man's general character is. The Courts hold that it is too broad a question; that is, a man may have a reputation for violence, that would be perfectly proper, if he were accused of murder, when he would not tell a lie. As far as honesty is concerned, and reputation for truth and veracity, you can go that far, but when you ask as to a man's general character, that might include his being a violent man, shooting game out of season or selling liquor to minors, or many other things that do not affect him as to truth telling or a lying man. That is the ground on which the Court has sustained the objection, is that it is too broad.

Mr. COLE.—Our contention is that it is the same as a woman [314] having a bad reputation for character as a man having a bad reputation for character in other lines, it might affect his character.

The COURT.—It might and it might not and you would get something before the jury that would have no place there.

Mr. COLE.—This deposition we took of Mr. Peter Stoller, from the Court's ruling, everything may be admitted but what was objected to on the ground at the time. I think that was the ruling on the other deposition.

The COURT.—I will rule on it when I get to it. I do not want to undertake to rule generally in advance.

[Deposition of Peter Stoller—Cross-examination, etc.]

Mr. COLE.—This is the cross-examination of Mr. Peter Stoller. The cross-examination starts out with regard to Frank Canaras. He had been asked in regard to the character and reputation of Frank Canaras on direct examination, and then he was cross-examined in regard to it. The first question is (reading), "Q. How long have you known Frank Canaras." This is cross-examination.

Mr. LANGHORNE.—That is all immaterial. They attempted in their direct examination of this witness, and they also attempted to impeach the character of Frank Canaras by another one of our witnesses, went on a wholesale expedition of impeaching witnesses, and the Court has ruled on that, and that cross-examination is directed to it. If he reads this cross-examination, it will obviate the Court's ruling.

The COURT.—I will overrule the objection. I think, it being your cross-examination, he may read it.

Mr. COLE.—(Reading:)

"A. I have known him about as long as,—very nearly as long as—well, at least five years.

Q. This [315] suit that you allude to in your testimony was one that you brought concerning the title to some land there, was it not? A. Yes.

Q. Your testimony then as in regard to Mr. Canarias is based upon his testifying for your opponent in that suit? A. Yes.

(Deposition of Peter Stoller.)

Q. Outside of this who have you heard at Long Beach making any statement against Mr. Canarias' character?

A. I don't like to give anybody away, but Mrs. Baker told me something of older days that Mr. Canarias wasn't the best in the world.

Q. Anybody else?

A. Not that I know of at present.

Q. Mr. Canarias is now holding a public official position there, is he not?

A. Well, he was during the beach season; I don't know whether he is at present or not. He was during the beach season constable or marshal or something like that, during the beach season.

Q. You mean he was deputy sheriff of the county?

A. I don't know whether he was or not, I saw he wore a star.

Q. I think you will see deputy sheriff. Is Long Beach an incorporated town? A. No, sir.

Q. Do they have any authorized officer in town known as a marshal? A. I don't know.

Q. Referring to Henry Kayler and his reputation, what do you mean in what respect it is not the best?

A. In the first place, he took insurance for Bill Black and Bill Black himself told me—Bill Black himself told me that he had accepted the money from Bill Black and kept it and never turned it over to the insurance company.

Q. Do you know whether it was ever paid or not?

A. I could not say, could not swear to that.

Q. When you speak of the reputation of William

(Deposition of Peter Stoller.)

Black, in what respect do you mean **[316]** that it is not the best?

A. From the general feeling of the people.

Q. From what?

A. From the general feeling and speaking of the people.

Q. Do you mean that his character—in his character he was of a quarrelsome disposition?

A. In one way he was. He got into a fight with John McKee not more than three weeks ago, might be a month ago.

Q. Do you know the merits or demerits of those quarrels he has had there? Do you know whether he was right or the other is right; do you know personally? A. I could not tell which is right.

Q. Did you ever hear the people generally state anything regarding Bill Black's character for truth and veracity?

A. I heard several of them say, 'I would not believe him on oath.'

Q. You evade my question, I say generally.

A. Well, that is what I mean, generally, people.

Q. Generally means all the people or a majority of them. A. Yes.

Q. Have you ever heard a majority of them?

A. Well, several have said they would not believe him on oath; I don't know how many.

Q. Can you name any persons that have made such statements to you? Tell me who they are, the names if you can; if you can't, why, say so.

A. Mr. Marks is one of them, he said that Mr.

(Deposition of Peter Stoller.)

Black stole a keg of nails from him.

Q. That keg of nails would be shown on the other shoe; never mind about that; go on.

A. Mr. Day is another one, Mr. Evan Day.

Q. Who is he?

A. He left this country now, left about two years ago.

Q. Is it not a fact that Marks was a bitter enemy of Black's over a transaction of Black having given him money to ferret out certain wrongdoings in the illegal sale of liquor at Long Beach and that Marks afterwards sought in **[317]** every way to get Black prosecuted; now isn't that a fact?

A. I know nothing of the trouble that occurred between the two parties, but I know this much that they are enemies.

Q. Didn't Marks tell you repeatedly, and others within your hearing, that he was going to break up Bill Black or do him up in business there?

A. Not to my knowledge. He said this much; he said, 'I am going to get even with him for stealing that keg of nails,' that is one thing I heard.

Q. Then he evidenced that he was a bitter enemy of Black's? A. Yes.

Q. How long have you known Marks?

A. I have only known him probably a little over two years.

Q. Do you know whether he is a citizen of the United States or not? A. I do not.

Q. Did he ever hold the office of justice of the peace while you resided there?

(Deposition of Peter Stoller.)

A. Not to my knowledge.

Q. Did he ever vote at any election since you have resided there? A. I never saw him vote.

Q. Speaking of the character of Henry Kayler in what respect do you allude to its being not the best prior to the time that the town went dry?

A. In the first place his reputation regarding that paying the insurance fees over to the company, that wasn't the best, and the next place he neglected his family by drinking.

Q. In this lawsuit that you referred to heretofore in your evidence, you were the plaintiff and one H. H. Tinker was the defendant?

A. Smith was the plaintiff, I was waiting for a quiet title.

Q. Weren't you and Smith joined as plaintiffs?

A. In one way we were, indirectly, in that he was to clear the title before he could get the balance of the money.

Q. Were you not seeking to acquire the title of the land [318] in controversy in that suit?

A. Yes, sir.

Q. Wasn't H. H. Tinker the defendant?

A. Yes, sir.

Q. Isn't H. H. Tinker the father in law of Henry Kayler? A. Yes, sir.

Q. Didn't Henry Kaylor and Tinker both testify against your interests in that suit?

A. They might have testified to a certain extent against my interests; a little bit, wasn't as much as Mr. Canarias.

(Deposition of Peter Stoller.)

Q. You from said testimony haven't felt very friendly toward either Canarias or Kayler, isn't that true?

A. No, Mr. Kayler and I have no hard feelings on that proposition at all, nor Mr. Canarias and I have no hard feelings on that proposition, but that forms general opinion in me what people will testify to. I have known Mr. Tinker and he and I are warm friends at the present and so are Mr. Kayler and I.

Q. Have you ever heard anyone say anything against the character of Henry Kayler regarding his truth and veracity, particular under oath?

A. Well, in the Black case that came off last spring—

Q. Well now, yes or no, the answer to that?

A. It wasn't good.

Q. Kayler's wasn't good?

A. Yes, wasn't considered good, outside of business. In business why Kayler's truth and veracity was all right.

Q. Mr. Stoller, when I asked the question about truth and veracity do you know it, or have you ever heard, the answer is always yes or no, if you have heard of it or—

A. That goes under different heads.

Q. No, it don't, that is the answer to the question.

A. I am willing to answer if I understand it right.

Q. (Read as follows:) Have you ever heard anyone say anything against the character of Henry Kayler regarding his truth and veracity, **[319]** particularly under oath?

(Deposition of Peter Stoller.)

A. I could not tell you exactly who said it, but they said they could not trust him under oath. I know I could trust Mr. Kayler in a business dealing especially now, but whether I could trust him under oath in a witness, I don't know.

Q. I didn't ask about your opinion, I am asking whether people talk to you.

A. I can't say much about that.

Q. In the case against Black that you allude to, what case was that? A. What?

Q. (Question read.)

A. That is selling liquors to minors.

Q. Were you a witness in that case? A. I was.

Q. Did you hear the testimony of the minor boys that he was charged with selling liquor to?

A. I heard some of it.

Q. Is it not a fact that said minor boys testified in that case that at the time they obtained liquor from Black they had made statements that they were over twenty-one years of age?

A. Not to my knowledge, I know that Black knew my boy was only—he was only sixteen at the time he sold him liquor.

Q. Never mind about that, I am asking—did you hear those boys testify to that?

A. I heard some of the testimony, I heard some testimony.

Q. Didn't some of the boys state that they had represented they were over twenty-one?

A. I didn't hear them.

Q. You didn't hear them? A. No.

(Deposition of Peter Stoller.)

Q. Is it not a fact that at the trial of said case the evidence showed that the boys had represented they were twenty-one or over? A. I didn't hear that.

Q. I know it was. That is all. I don't care, as far as that. Did you and William Black ever have any dispute over any business matter? A. Yes.

Q. You say then you were familiar with Black's saloon? A. Yes. [320]

Q. You were also familiar with various other saloons, were you not? A. Well, I knew Mr. Nye.

Q. You knew of Mr. Nye's being sold out under attachment? A. I knew he sold out.

Q. Do you know who bought the stock in?

A. I am not sure, no.

Q. What kind of a stock did Black have compared with other saloons?

A. What liquor I got from Mr. Black was good.

Q. You don't get my point. What kind of stock, I mean, in size? A. Oh, how much there?

Q. Yes.

A. I saw a lot of barrels there, but I don't know what was in them.

Q. From the appearance of the saloon was it not a much larger stock than any ordinary saloon carried?

A. It was a wholesale house, he had a wholesale liquor and retail liquor license.

Q. You know that?

A. Yes, that is what he told me, he said he had wholesale liquors.

Q. Did you ever see any such license there?

A. No, I could not swear to that.

(Deposition of Peter Stoller.)

Q. When you got liquors from him, they were always of the best and highest grade, were they not?

A. I ordered the best.

Q. Did you ever count the number of barrels and cases? A. No, I did not.

Q. Did you ever see some barrels lying on the floor in the back part, that were not upon the rack?

A. At one time I saw to my knowledge, two barrels there.

Mr. COLE.—You mean in the back room, Mr. Brumbach?

Mr. BRUMBACH.—No, in the back part under the doorway.

A. The back part.

Mr. COLE.—The back room?

A. Yes, the back room.

Mr. BRUMBACH.—There are three, not the extreme back room.

A. I could not say what was in them, I saw the barrels.

Q. Did you ever count the number of barrels that were on the racks?

A. No, my judgment only is that there might have been something [321] between eight or ten on the bottom tier and about six or eight on the top tier; might have been a little more, a little less, I never counted them.

Q. Did you ever count the number of case liquors that he had?

A. I never bought any cased liquor there or ever counted any boxes or cases.

(Deposition of Peter Stoller.)

Q. Wasn't there a large number of boxes piled up in the back room of cased goods?

A. Not that I saw, there was a few but not many.

Q. You never saw in the back room, extreme back room?

A. Yes, I was in the extreme back room, side room, I was in there too.

Q. You aren't very friendly with Black now, are you, have no dealings?

A. Well, I would be friendly if he would speak, but the trouble we have had, there is no hard feelings so far as I am concerned.

Q. Were you ever residing there in the vicinity of Long Beach when Henry Kayler was Justice of the Peace?

A. I really don't know when he was justice of the peace; I could not tell that.

Redirect Examination.

Q. What was this business trouble you said you had with William Black?

A. I took a wood contract for my minor son, from him, words; and he told me that I should go and cut wood off of lot 9 which he claimed a half interest in and when it came to the time that I should cut the wood, in fact I took the contract for my son, not for me, but when it came to fulfill the contract I wanted writings from him to give me a legal right to cut wood on that land since I found out the land wasn't paid for yet, and I thought that it was safer for me to have writings, and when I demanded the writings he refused to give them to me and I told him the deal

(Deposition of Peter Stoller.)

was off and he asked me to take a drink with him [322] and I refused the drink, and since then I haven't been in his house, any more, but we had no words at all, that is, of hard feelings.

Q. Did you ever have any other trouble with him?

A. No, sir.

Q. Do you hold anything against him on account of that business transaction? Do you hold any enmity against him on account of that wood deal?

A. No, not a bit, I would shake hands with him to-day.

Q. About how many cases of goods would you estimate that there was in the back room?

A. I could not say that I saw any, I saw a few cases in front.

Q. About how many?

A. I don't think I ever saw over a dozen.

Q. Was that in the bar-room or the room next to the bar-room?

A. Yes, standing in front of the barrels and around the front part of the saloon.

Q. Did you ever see any beer barrels in the front room? A. Yes, sir.

Q. How many?

A. At times I saw the whole alley was considerably filled, must have been six or eight barrels, beer barrels of empty bottles.

Recross-examination.

Q. From your present status of feeling you would not trust Black as though this difference never occurred, would you?

(Deposition of Peter Stoller.)

A. Trust him on what, what difference do you mean?

Q. Difference that you allude to between you and him?

Mr. COLE.—You mean the wood deal?

Mr. BRUMBACH.—The deal yes, wood deal.

A. I don't know as that would cut any figure between us at all, I don't think it would.

Q. You don't know; you don't think it would?

A. No.

Witness excused.

(Signed) PETER STOLLER." **[323]**

Mr. COLE.—I offer the deposition of W. P. Adams in evidence.

The COURT.—Taken under stipulation?

Mr. COLE.—Yes.

The COURT.—It may be admitted.

Mr. COLE.—These are just depositions in regard to the stock. Part of them were read yesterday. This is the deposition of W. P. Adams, a resident of Portland, Oregon, and a member of the firm of Henry Fleckenstein & Company.

[Deposition of W. P. Adams.]

(Reading:)

"Q. State your name and residence.

A. W. P. Adams; Portland, Oregon.

Q. State your occupation.

A. Manager and secretary of Henry Fleckenstein & Company.

Q. State whether or not the firm of Fleckenstein & Company ever sold and delivered to William

(Deposition of W. P. Adams.)

Black, one-half (½) barrel of Hudson Bay Rum. If so, state the date when the same was sold and the price received therefor.

A. Yes; December 11, 1911; $52.80.

Q. State where said rum was delivered.

A. Delivered to O. W. R. & N. Boat, consigned to William Black, Long Beach, Washington.

Q. Produce and attach to your deposition and mark same Exhibit 'A' for identification, duplicate invoices or statement of all goods sold and delivered to the defendant William Black, by the firm of Fleckenstein & Company.

A. Invoices are hereto attached marked Exhibit 'A.'

Q. State whether said liquor does or does not improve in quality and value when aged in barrel.

A. Yes.

Q. If your answer is that it so improves, state what the yearly increase of value is.

A. About ten per cent.

(Signed) W. P. ADAMS."

We wish to offer in evidence the duplicate invoice. **[324]**

Mr. LANGHORNE.—No objections.

Whereupon said invoice was admitted in evidence and marked Defendant's Exhibit "P" of this date.

Mr. COLE.—This is a statement of all the goods that Fleckenstein & Company sold to Mr. Black. (Reading:)

[Defendant's Exhibit "P"—Statement of Goods Sold.]

"Dec. 11th, 1905, 5 casks Beer (quarts), @ $11.00, $55.00; 1 case Pabst Malt, $17.00; total, $72.00. June 9th, 1906, 5 cases Kentucky Taylor @ $10.00, $50.00. June 21st, 1906, ½ bbl. Sherry, 27½ gal. @ $.75, $20.62. Aug. 18th, 1906, 1 gr. Flasks, S. F. pts. $4.25; 1 gr. Flasks, S. F. ½ pts. $3.25; 1 sack corks assorted 5 & 7, $1.50; total $9.00. Nov. 23rd, 1906, 2 c. Idanha, $6.50, $13.00; 4 M. T. Orange Wine Bottles labeled (gratis). Mar. 14th, 1907, 2 c. Idanha, $6.50; $13.00. Apr. 12th, 1907, 2 gr. Flasks ½ pt. $3.25, $6.50."

Mr. LANGHORNE.—You are not claiming that these are included in the inventory?

Mr. COLE.—Our purpose is to show all of the goods that he ever bought and then we can tell whether he had them on hand or not. (Continuing reading:) "May 15th, 1907, ½ bbl. Brandy, 2s—24.99 P. Gal. $2.50, $62.47. Aug. 29th, 1907, 4⅞ gal. Kummel, $2.25, $11.00; 1 keg, $1.25; total $12.25. Aug. 7th, 1911, 1 bbl. Mellwood, 41.72 gal. @ $2.25, $93.87. Aug. 29th, 1911, 4⅞ gal. G. Brandy, $2.25, $11.00; 1 sack #7 corks, $1.25; 1 5-gal. keg, $1.25; total, $13.50. Oct. 23rd, 1911, prepaid freight, $.65. Nov. 20th, 1911, 1 c. Decanters, filled B. Taylor, $15.00; 1 c. Rock & Rye, $6.00; prepaid freight, $.75; total, $21.75. Dec. 7th, 1911, ½ bbl. Jam Rum, 26.40, gal. $2.00, $52.80; 2 gr. Flasks 1 oz. [325] $5.00, $10.00; 1 gr. Flasks, 5 oz. $4.00; Cooperage, $1.50; total, $68.30."

(Deposition of Daniel L. Schlegel.)

Mr. COLE.—I will now offer in evidence the deposition of Daniel L. Schlegel, taken under stipulation.

The COURT.—It may be admitted.

[Defendant's Exhibit "Q"—Deposition of Daniel L. Schlegel.]

Mr. COLE.—(Reading:)

"Q. State your name, age and residence.

A. Daniel L. Schlegel, forty years of age, residence, Louisville, Kentucky.

Q. State what, if any, postition you hold with the firm of Old Kentucky Distillery Company, of Louisville, Kentucky.

A. I am vice-president and secretary of Old Kentucky Distillery, Inc., and have been with the firm fourteen years.

Q. State whether or not said firm of Old Kentucky Distillery Company ever sold and delivered to William Black, of Long Beach, Washington, any wines, liquors, cigars or other merchandise; if so, state what was sold, the amount, date and price paid therefor.

A. No, we did not sell him at Long Beach but did sell him a bill at Ilwaco, Washington on August 11, 1906; the amount of same $172.44, it being Kentucky Deer Whiskey and these are all the whiskies we have sold him within the last five years.

Q. If you state that any goods were sold, state who paid the freight thereon.

A. He did as the whiskey above-mentioned was sold by us F. O. B. Louisville.

Q. Produce, attach to your deposition and mark Exhibit 'A' for identification, statement or duplicate

invoices of all goods sold and delivered by the firm of Old Kentucky Distillery Company, to William Black, of Long Beach, Washington.

A. I herewith file and mark Exhibit 'A' for identification the only bill of goods we have sold him [326] which was shipped to Ilwaco, Washington, on Aug. 11, 1906.

(Signed) DAN L. SCHLEGEL."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "Q" of this date.

Mr. COLE.—We wish to offer the deposition of W. O. Van Schuyver in evidence.

The COURT.—Taken under the same stipulation?

Mr. COLE.—Yes.

The COURT.—It is admitted.

[Defendant's Exhibit "S"—Deposition of W. O. Van Schuyver.]

Mr. COLE.—(Reading.)

"Q. State your name and residence. [327]

A. W. O. Van Schuyver, Portland, Oregon.

Q. State what, if any, position you hold with the firm of W. J. Van Schuyver & Company.

A. I am president of the company.

Q. State whether or not the firm of W. J. Van Schuyver & Company ever sold and delivered to William Black, of Long Beach, Washington, any liquors. If so, state what liquors were sold, the price received therefor and the date when said sale was made.

A. Yes, we sold him: 1 cs. Cyrus Noble Bourbon, 5's, $15.00, on August 28, 1909; 2 cs. Glysmic, Qts. @

(Deposition of W. O. Van Schuyver.)

8.50, 17.00; 2 cs. B. H. Sauterne, Qts. @ 3.50, 7.00; 2 cs. B. H. Riesling, Qts. @ 3.25, 6.50, on March 26, 1910; 5 cs. W. S. Lacey, B. B. 5 cs. price 11.50, 57.50; 2 cs. Black & White, 13.50, 27.00; 2 Gro. #12 Corks, 75, 1.50; 1 Sk. #5 XX Taper Corks, 5-gro. 1.25, on May 20, 1910; 2 Gro. Olympia Flasks 10 oz. @ 4.50, 9.00; 1 cs. Glysmic, Qts. 8.50, on July 16, 1910; 2 Cans Com'l Alcohol, 13.50, 27.00 on Sept. 10, 1910; 2 Cans Com'l Alcohol, 9½, 2.95, 28.00 on March 26, 1910. 1 BBL. T. B. Ripey, 1892, 28, 3.75, 105.00; 2 cs. Cyrus Noble Bourbon, 5's, 14.50, 29.00, on Oct. 27, 1906. 1 Cs. Reads Porter, Pts. $15.00; 1 Cs. DeKuyper Gin, 18.50, on April 19, 1907. 1 Cs. Reads Porter, Pts. 15.00 on Dec. 6, 1907. 4¾ Cal Jam Rum #3, @ 2.25, 10.70; Boxed Demijohn, 2.00, on August 28, 1909.

Q. If you state that liquors were sold, state to whom they were delivered.

A. These goods were delivered to Wm. Black, part of them at Ilwaco, Washington, and the remainder at Long Beach, Washington, as you can see from the invoices attached to this deposition.

Q. State whether or not the price paid therefor included the freight.

A. These [328] prices did not include the freight. The bills for the freight are also attached to this deposition.

Q. Produce, attach to your deposition and mark the same Exhibit 'A' for identification, statement or duplicate invoice of all goods sold to William Black by the firm of W. J. Van Schuyver & Company.

(Deposition of W. O. Van Schuyver.)

A. Invoices are attached thereto and marked Exhibit 'A' for identification.

(Signed) W. O. VAN SCHUYVER."

Mr. LANGHORNE.—We have no objections to its admission.

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "S" of this date.

Mr. COLE.—I wish now to offer in evidence the deposition of H. S. Wooley, taken under the same stipulation.

Mr. LANGHORNE.—We have no objections.

The COURT.—It may be admitted.

[Defendant's Exhibit "T"—Deposition of H. S. Woolley.]

Mr. COLE.—(Reading:)

"Q. State your name and residence.

A. H. S. Woolley and I reside at the City of Seattle, King County, Washington.

Q. State what, if any, position you occupy with the firm of Woolley & Company, Inc.

A. I am the Secretary and Manager of Woolley & Company, Inc.

Q. State whether or not the firm of Woolley & Company, Inc., ever sold and delivered to William Black, of Long Beach, Washington, any cigars. If so, state the amount sold, date and price paid therefor.

A. Yes, Woolley & Company, Inc., sold and delivered to William Black of Long Beach, Washington, eleven hundred cigars; the date of sale of said cigars was July 12, 1911 and the price paid therefor was

(Deposition of H. S. Woolley.)

Thirty-five Dollars, and said amount was paid in full on the 11th day of August, 1911.

Q. State whether or not the firm of Woolley & Company, Inc. ever [329] sold and delivered to William Black, of Long Beach, Washington, any Manila Cigars. If so, state the amount sold, date and price paid therefor.

A. Yes, Woolley & Company, Inc. sold William Black, of Long Beach, Washington, some Manila Cigars. The cigars mentioned and described in my answer to Question No. 3 were Manila cigars, and the amount sold, date and price paid therefor are as stated in my answer to Question No. 3.

Q. If any cigars were sold by the firm of Woolley & Company, Inc. to William Black, of Long Beach, Washington, state by whom the freight thereon was paid.

A. To the best of my knowledge and recollection, the freight on said cigars was paid by William Black, of Long Beach, Wash.

Q. Produce, attach to your deposition and mark same Exhibit 'A' for identification, statement or duplicate invoice of all cigars sold by the firm of Woolley & Company, Inc. to William Black, of Long Beach, Washington.

A. As required by Question 6, the witness produces and attaches to this deposition a statement and duplicate invoice of all cigars sold by the firm of Woolley & Company, Inc. to William Black of Long Beach, Washington, and the same is marked Exhibit 'A' for identification.

(Signed) H. S. WOOLLEY."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "T" of this date.

Mr. COLE.—I now offer in evidence the deposition of E. J. Cramsie, taken under stipulation.

No objections.

The COURT.—It may be admitted.

[Defendant's Exhibit "U"—Deposition of E. J. Cramsie.]

Mr. COLE.—(Reading:)

"Q. State your name and residence. [330]

A. E. J. Cramsie, Portland, Ore.

Q. State what, if any, position you occupy with the firm of 'The Hart Cigar Company.'

A. Secretary of the Hart Cigar Company.

Q. State whether or not the firm of The Hart Cigar Company ever sold and delivered to William Black, of Long Beach, Washington, any cigars. If so, state the date when said sales were made and the price paid therefor.

A. We sold him May 27th, 1910, 1 M Manilla, La Isabella, 30.–30.00; 300 Optimo R. V. 90.–27.00; 200 Monograms R. C. 85.–17.00; 74.00. We sold him July 20th, 1910, 1 M Isabella, 30.–30.00; 200 Gato R. V. 90.–18.00; 48.00 We sold him June 30th, 1911, 500 Gato R. V. 90.–45.00; 500 Optimo, R. V. 90.–45.00; 90.00.

Q. Produce and attach to your deposition and mark the same Exhibit 'A' for identification, duplicate invoices or statement of all cigars sold by the firm of The Hart Cigar Company to William Black during the two years prior to June 1, 1912.

(Deposition of E. J. Cramsie.)

A. Duplicate invoices are attached to the deposition and marked Exhibit 'A' for identification.

(Signed) E. J. CRAMSIE."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "U" of this date.

Mr. COLE.—I now wish to offer in evidence the deposition of C. R. Brinkley, taken under the same stipulation.

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

[Defendant's Exhibit "W"—Deposition of C. R. Brinkley.]

Mr. COLE.—(Reading:)

"Q. State your name, age and residence.

A. C. R. Brinkley; age, 34; residence, Portland, Oregon.

Q. State what position you hold with the firm of Mason-Ehrman & Company, of Portland, Oregon.

A. I am the **[331]** creditman.

Q. State whether or not the firm of Mason-Ehrman & Company ever sold and delivered to William Black, of Long Beach, Washington, any 'Y. & B.' cigars. If so, state the date, the amount sold and the price paid therefor.

A. Yes, we sold him 1000 Y. B. Cigars on July 5th, 1911, price $80.00.

Q. State whether or not Mason-Ehrman & Company ever sold and delivered to William Black, of Long Beach, Washington, any other cigars. If so, state what cigars have been sold, the date thereof and

(Deposition of C. R. Brinkley.)

the price paid therefor.

A. We sold him cigars as follows: 100 Carabana Cel. 9.00; 500 Full Dress, 26.00; 100 Carabana C. C. 9.00.

Q. Produce, attach to your deposition and mark Exhibit 'A' for identification, statement or duplicate invoice of all cigars sold and delivered to William Black, of Long Beach, Washington, by Mason-Ehrman & Company.

A. Duplicate invoices of all cigars also some Cigarettes and Cigarette Papers sold to Wm. Black are attached herewith and marked Exhibit 'A' for identification.

(Signed) C. R. BRINKLEY."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "W" of this date. [332]

[Testimony of W. S. Lee, for Defendant.]

W. S. LEE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

My name is W. S. Lee. I am in the mercantile business, general repairing, and so on. I have had quite a good deal to do with locks. I reside in Tacoma. I have been in the business mentioned about twelve years.

Q. What kind of work do you do in connection with locks?

A. Well, we make keys and repair them, and most anything that comes up in the way of locks.

I am familiar with a great many locks, how they

(Testimony of W. S. Lee.)

are made and how they work. I am a general locksmith.

I know how the lock (Defendant's Exhibit "O") would be locked. There might be and could have been different ways how it might be locked. The bar stands out, I should say, about 3/8 of an inch when it is locked. It is forced out by the key. When the lever is pushed out by the key, I mean when the bolt is pushed out by the key, there is a lever drops down with a little notch on it, dropped behind a little lug that is fast on the bolt, cast fast on the bolt thereby won't allow it to push back. That is true of all locks—locks like the kind I have in my hands (Defendant's Exhibit "O"). The other lock (part of Defendant's Exhibit "O") is a similar lock, practically speaking. I would say the same, as a general rule, regarding the other lock. A lock of this kind has more than one lever. One of that kind (indicating) scarcely ever has more than one. The bolt is withdrawn by the key, pushed out, the key throws up the lever the same as it is pushed out. I should say that the two locks are exactly alike; they would be **[333]** operated in the same way. Regarding the third lock, part of the mechanism of a lock in this particular case is destroyed, I might say as to how I thought it was but I could not testify positively, because this part here (indicating) contains the lock, and this portion up here (indicating) is merely the bolt, and I should say through the heat caused by the fire—you might say one has adhered to the other, has got so hot it fastened the two together. If these locks

(Testimony of W. S. Lee.)

were as I see them now they were not locked before the fire.

Cross-examination by Mr. LANGHORNE.

Q. Supposing they had been unlocked after the building started to catch fire? If somebody had unlocked them and gone into the building, they would be in that same condition?

A. Yes, I should say, yes. If they were unlocked before the fire.

Q. Supposing a fire broke out in the building and somebody unlocked the doors and went in, the locks would be in the same condition as they are there now (indicating)?

A. They surely would, yes, sir. [334]

Mr. COLE.—I will now offer in evidence the deposition of O. T. Wollaston.

The COURT.—Taken under stipulation?

Mr. COLE.—Yes.

The COURT.—It may be admitted.

[Deposition of O. T. Wollaston.]

Mr. COLE.—(Reading:)

"Q. State your name, age and residence.

A. O. T. Wollaston; twenty-nine years of age; I live in Louisville, Kentucky.

Q. State what, if any, position you hold with the firm of Bonney Brothers, of Louisville, Kentucky.

A. I am now and have been for the past three years office manager of Bonney Brothers, but connected with the company for the past ten years.

A. State whether or not said firm of Bonney Brothers ever sold and delivered to William Black,

(Deposition of O. T. Wollaston.)

of Long Beach, Washington, any wines, liquors, cigars, or other merchandise; if so, state what was sold, the amount, date and price paid therefor.

A. They have not sold him anything within the past five years.

Q. If you state that any goods were sold, state who paid the freight thereon.

A. As I stated before, we sold him nothing.

A. Produce, attach to your deposition and mark Exhibit 'A' for identification, statement or duplicate invoices of all goods sold and delivered by the firm of Bonney Brothers to William Black, of Long Beach, Washington.

A. I have no invoice as we have sold him nothing.

(Signed) O. T. WOLLASTON." **[335]**

Mr. COLE.—I will now offer the deposition of S. E. Haycraft, taken under stipulation.

The COURT.—It may be admitted.

[Defendant's Exhibit "Z"—Deposition of S. E. Haycraft.]

Mr. COLE.—(Reading:)

"Q. State your name, residence and occupation.

A. My name is S. E. Haycraft. I reside in the city of Berkeley, State of California. My occupation is that of employee of the firm of James De Fremery and Company, wholesale liquor dealers, at Number 519 Mission Street, San Francisco, California. **[336]**

Q. State what, if any, position you hold with the firm of James de Fremery & Co.

A. I am the Manager.

(Deposition of S. E. Haycraft.)

Q. State whether or not the firm of James de Fremery & Co. ever sold and delivered to William Black of Long Beach, or Ilwaco, Washington, one barrel of Imported Port Wine. If so, state the date when said sale was made and the price received therefor.

A. Yes, one octave—sixteen gallons—on the 10th day of June, 1908, at the price of $2.50 per gallon, or $40.00 in all, f. o. b. San Francisco. The wine was shipped to Black at Ilwaco, Washington.

Q. State whether or not the firm of James de Fremery & Co. ever sold and delivered to William Black of Long Beach, or Ilwaco, Washington, four cases of Gibson Rye Whiskey. If so, state the date when said sale was made and the price received therefor.

A. Yes, five cases were sold and delivered to him at Long Beach on June 29th, 1911, at the price of $9.00 per case f. o. b. San Francisco.

Q. State whether or not the firm of James de Fremery & Co. ever sold and delivered to William Black of Long Beach, or Ilwaco, Washington, fifteen cases of J. B. Frazier's whiskey. If so, state the date when said sale was made and the price received therefor.

A. Yes, more than fifteen cases. On April 10th, 1906, while Black was at Ilwaco, the firm sold and delivered to him ten cases of J. B. Frazier's Whiskey at the price of $10.00 per case f. o. b. San Francisco. On August 24th, 1908, the firm sold and delivered to him at Long Beach twenty-five cases of the same at

(Deposition of S. E. Haycraft.)

the price of $9.50 per case f. o. b. San Francisco.

Q. State whether or not the firm of James de Fremery & Co. ever sold and delivered [337] to William Black of Long Beach, or Ilwaco, Washington, two cases of Muscat Wine. If so, state the date when said sale was made and the price received therefor.

A. Yes, two cases of Muscatel Wine at Long Beach on June 29th, 1911, at the price of $3.50 per case f. o. b. San Francisco.

Q. State whether or not the firm of James de Fremery & Co. ever sold and delivered to William Black of Long Beach, or Ilwaco, Washington, two cases of Angelica*l* Wine. If so, state the date when said sale was made and the price received therefor.

A. Yes, two cases of Angelica Wine at Long Beach on June 29th, 1911, at the price of $3.50 per case f. o. b. San Francisco.

Q. Produce and attach to your deposition and mark same Exhibit 'A' for identification, duplicate invoices or statement of all goods sold and delivered to William Black by the firm of James de Fremery & Co.

A. I have attached to this deposition a statement of all goods sold and delivered to William Black of the firm of James de Fremery & Co. and marked the same exhibit 'A.'

Cross-interrogatories.

Q. State whether said liquor improves with age. State fully.

A. The wines might improve with age if properly handled and stored. The bottles should be stored in

(Deposition of S. E. Haycraft.)

a moderately cool place and even temperature and be laid flat. If stored in a warm place or left standing the wine would deteriorate. Whiskies would not improve in glass, but would ordinarily improve slightly in wood.

(Signed) S. E. HAYCRAFT."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "Z" of this date.

Mr. COLE.—I now wish to offer in evidence the deposition of [338] E. W. Duffy, taken under stipulation.

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

[Defendant's Exhibit "A-1"—Deposition of E. W. Duffy.]

Mr. COLE.—(Reading:)

"Q. State your name and residence.

A. E. W. Duffy, Portland, Oregon.

Q. State what, if any, position you occupy with the firm of M. A. Gunst & Company.

A. Portland Manager for M. A. Gunst & Co., Inc.

Q. State whether or not the firm of M. A. Gunst & Company ever sold and delivered to William Black, of Long Beach, Washington, one thousand 'Attencion' cigars. If so, state the date when said sale was made and the price paid therefor.

A. Yes. May 27, 1912, $28.50.

Q. State whether or not the firm of M. A. Gunst & Company ever sold and delivered to William Black, of Long Beach, Washington, five hundred 'Alham-

(Deposition of E. W. Duffy.)

bra' cigars. If so, state the date when said sale was made and the price paid therefor.

A. Yes. May 27, 1912, $17.50.

Q. State whether or not the firm of M. A. Gunst & Company ever sold and delivered to William Black, of Long Beach, Washington, any 'Manila' Cigars. If so, state the date when said sale was made and the price paid therefor.

A. Yes. May 27, 1912. These Manila cigars are the same ones as 'Alhambra' Cigars mentioned in Question #4. 'Alhambra' is the name of the brand and 'Manila' the kind of cigar. Alhambra Manila Cigars.

Q. State whether or not William Black ever purchased from the firm of M. A. Gunst & Company any 'Van Dyke' Cigars. If so, state the date when said sale was made and the price paid therefor.

A. Yes. June 15, 1910, $45.00.

Q. Produce and attach to your deposition and mark the same Exhibit [339] 'A' for identification, duplicate invoices or statement of all goods purchased by William Black from the firm of M. A. Gunst & Company subsequent to June 14, 1910.

A. Invoices hereto attached marked Exhibit 'A.'

(Signed) E. W. DUFFY."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "A-1" of this date.

Mr. COLE.—I will now offer in evidence the deposition of C. C. Griffin.

The COURT.—Taken under stipulation?

Mr. COLE.—Yes.

No objections.

The COURT.—It may be admitted.

[Defendant's Exhibit "A-2"—Deposition of C. C. Griffin.]

Mr. COLE.—(Reading:)

"Q. State your name and residence.

A. My name is C. C. Griffin. I reside at Millbrae, San Mateo County, California.

Q. State what, if any, position you occupy with the firm of Sherwood and Sherwood, of San Francisco, California.

A. I am the creditman of Sherwood and Sherwood, a corporation, doing business at San Francisco, California.

Q. State whether or not said firm ever sold and delivered to William Black, of Long Beach, or Ilwaco, Washington, any liquors. If so, state what liquors were sold, the date thereof and the price received therefor.

A. Yes. Sherwood and Sherwood sold and delivered to William Black at Ilwaco, Washington, certain liquors between and inclusive of the 16th day of June, 1906, and the 26th day of August, 1907. On the 16th day of June, 1906, Sherwood and Sherwood sold and delivered to Black one case of **[340]** Burke's Old Tom Gin at the price of $9.50; one case (pints) of Guinness Porter Stone at the price of $15; one case of J. H. Cutter O. K. (V. F. O.) at the price of $11 and one case of J. H. Cutter O. K. Whiskey at the price of $11. On the 16th day of July, 1907,

(Deposition of C. C. Griffin.)

Sherwood and Sherwood sold and delivered to William Black one case of House of Lords Scotch Whiskey at the price of $13; one case of Black & White Whiskey at the price of $13; one case of Martell Brandy at the price of $18; one case of Hennessy Brandy at the price of $18; five cases of J. H. Cutter A #1 Whiskey at the price of $10 per case—$50; one case of J. H. Cutter A #1 Whiskey was delivered to Black without any charge therefor. One the 31st day of July, 1907, Sherwood and Sherwood sold and delivered to William Black one case of Black & White Whiskey at the price of $13; one case of Martell Brandy at the price of $18; one case of Hennessy Brandy at the price of $18; five cases of J. H. Cutter A #1 Whiskey at the price of $10 per case—$50; one case of J. H. Cutter A #1 Whiskey was delivered to Black without charge therefor. Insurance on these goods amounting to $.99 was also charged to Black. On the 26th day of August, 1907, Sherwood and Sherwood sold and delivered to William Black one barrel (pints) of Burke's Porter Stone at the price of $15.50. No other goods have been sold and delivered by Sherwood and Sherwood to William Black.

Q. State whether or not the price received included the freight.

A. No, the price received for the goods did not include the freight thereon. The goods were sold to [341] Black f. o. b. San Francisco, California.

Q. State by whom the freight on said goods was paid.

(Deposition of C. C. Griffin.)

A. The freight on the goods was paid by William Black.

Q. Produce, attach*ed* to your deposition and mark same Exhibit 'A' for identification, duplicate invoices or statement of all goods sold by the firm of Sherwood and Sherwood to William Black, of Long Beach, or Ilwaco, Washington.

A. I have attached to this deposition an itemized statement of all goods sold and delivered by Sherwood and Sherwood to William Black and have marked the same Exhibit 'A' for identification.

(Signed) C. C. GRIFFIN."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "A-2" of this date.

Mr. COLE.—I will offer the deposition of Fred Zimmerman in evidence, taken under stipulation.

No objections.

The COURT.—It may be admitted.

[Defendant's Exhibit "A-3"—Deposition of Fred Zimmerman.]

Mr. COLE.—(Reading:)

"Q. State your name and residence.

A. Fred Zimmerman, Portland, Oregon.

Q. State what position you hold with the firm of F. Zimmerman & Company of Portland, Oregon.

A. I am Treasurer of the Company.

Q. State whether or not the firm of F. Zimmerman & Company ever sold any liquors to William Black, of Long Beach, Washington.

A. Yes.

(Deposition of Fred Zimmerman.)

Q. If you state that certain liquors were sold by F. Zimmerman & Company to William Black state where said liquors were shipped and whether or not the price paid included the freight.

A. Goods were shipped to Long Beach, Washington. These prices did not include freight.

Q. State who paid the freight on any goods that may have been sold by F. Zimmerman **[342]** & Company to William Black, of Long Beach, Washington.

A. We prepaid the freight on two invoices and the other we shipped collect.

Q. Produce, attach to your deposition and mark Exhibit 'A' for identification, statement or invoice of all goods sold by the firm of F. Zimmerman & Company to William Black, of Long Beach, Washington.

A. Invoices are attached and marked Exhibit 'A' for identification.

(Signed) FRED ZIMMERMAN."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "A-3" of this date.

Mr. COLE.—I now wish to offer in evidence the deposition of J. A. Fagothey.

The COURT.—Taken under stipulation?

Mr. COLE.—Yes.

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

[Defendant's Exhibit "A-4"—Deposition of J. A. Fagothey.]

Mr. COLE.—(Reading:)

"Q. State your name and residence.

A. My name is J. A. Fagothey. I reside at San Francisco, California.

Q. State what, if any, office you hold with the firm of F. Chevalier Company.

A. I am the Secretary of The F. Chevalier Co., a corporation doing business at Numbers 246 to 256 Mission Street, San Francisco, California.

Q. State whether or not the firm of F. Chevalier Company ever sold and delivered to William Black of Long Beach, or Ilwaco, Washington, one barrel of Old Crow Whiskey. If so, state the date when said sale was made and the price paid therefor.

A. I cannot say of my own knowledge or recollection whether or not the company ever sold and delivered to William Black one [343] barrel of Old Crow Whiskey. If so it was before the great fire which occurred here April 18th, 1906. The Company sold Black lots of goods before that date, but all of the Company's books and records were destroyed by the fire and for that reason I am unable to state what goods were sold and delivered to him before April 18th, 1906. No sale to Black of Old Crow Whiskey has been made by the Company since the fire.

Q. Produce and attach to your deposition and mark same Exhibit 'A' for identification, duplicate invoices or statement of any and all goods which may

(Deposition of J. A. Fagothey.)

have been sold by the F. Chevalier Company to William Black.

A. I have attached to this deposition an itemized statement of all goods sold by The F. Chevalier Co. to William Black subsequent to April 18th, 1906, and have marked the same Exhibit 'A' for identification.

Cross-interrogatories.

Q. State whether said liquor in barrel does or does not improve in quality and value.

A. Yes, whiskey like Old Crow in barrels would improve in quality and value with age.

Q. If your answer is that it does improve state what the yearly increase is.

A. I think the increase would be about five per cent. per annum in quality and value.

(Signed) J. A. FAGOTHEY."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "A-4" of this date.

Mr. COLE.—I offer the deposition of Fred Rothchild in evidence, taken under stipulation.

No objections.

The COURT.—It may be admitted.

[Defendant's Exhibit "V"—Deposition of Fred Rothchild.]

Mr. COLE.—(Reading:)

"Q. State your name and residence. **[344]**

A. Fred H. Rothchild, Portland, Oregon.

Q. State whether or not you are a member of the firm of Rothchild Bros. of Portland, Oregon.

A. Yes.

(Deposition of Fred Rothchild.)

Q. State whether or not Rothchild Bros. ever sold and delivered to William Black four cases of Guggenheim Whiskey. If so, state the date of said sale and the amount received therefor.

A. Sold him five cases of Guggenheim Whiskey, December 12, 1910, $45 for the five cases.

Q. State whether or not Rothchild Bros. ever sold and delivered to William Black four cases of Hermitage Whiskey. If so, state the date of said sale and the amount received therefor.

A. Possibly, though if so, such sale must have been made prior to April 15, 1908. We sold him no goods between August 1, 1908, and December 12, 1910, when we sold him the invoice of which the goods mentioned in question three were a part and none after that date.

Q. State whether or not Rothchild Bros. ever sold and delivered to William Black four cases of Yellowstone Whiskey. If so, state the date of said sale and the amount received therefor.

A. Same answer as #4. This whiskey is staple and no man unless he does no business keeps case goods more than a year, and our records before August 1, 1908, are inaccessible at present. Can get them if absolutely necessary but it isn't necessary.

Q. Produce and attach to your deposition duplicate invoices or statement of the goods before mentioned and mark same Exhibit 'A' for identification.

A. Invoice hereto attached marked Exhibit 'A.'

Q. Produce and attach to your deposition and mark the same Exhibit 'B' for identification, state-

(Deposition of Fred Rothchild.)

ment or invoices of all goods sold and delivered by the [345] firm of Rothchild Bros. to William Black.

A. Answered.

(Signed) FRED H. ROTHCHILD."

Whereupon said deposition was admitted in evidence and marked Defendant's Exhibit "V" of this date.

Mr. COLE.—I will offer the deposition of Frank Lyniff, taken under stipulation.

The COURT.—It may be admitted.

[Deposition of Frank Lyniff.]

Mr. COLE.—(Reading:)

"Q. State your name and residence.

A. Frank Lyniff; residence, ten miles northwest of Salem, Oregon.

Q. State whether or not you are acquainted with William Black, of Long Beach, Washington.

A. Yes.

Q. State whether or not you visited William Black's saloon located on lot six in block six, Tinker's North Addition to Long Beach, in Pacific County, Washington, within a short time prior to June 27, 1912.

A. I was in Black's saloon about June 24, 1912, and again about June 26, 1912.

Q. If you did visit said saloon shortly before June 27, 1912, state what you observed relative to the amount of wines, liquors and cigars at that time on hand by said Black and kept for sale by him in his saloon.

A. It looked to me like his stock had run down

(Deposition of Frank Lyniff.)

pretty well. He had us under the impression he was going to sell out or rent the place, to fix it up to rent it, so he said.

Q. If you did enter the saloon of William Black shortly prior to June 27, 1912, state about how many liquor barrels you saw, and state whether or not they were full or empty.

A. He had about six or eight barrels on the racks in the front room. I tapped on the heads of several of the barrels. They were all in a row, and they sounded pretty hollow. **[346]**

Q. State what you saw with reference to cases and barrels on hand by said Black shortly prior to June 27, 1912, with reference to said cases and barrels being full of liquor or empty.

A. I didn't notice very many cases in there. He had had a good many barrels on those racks in the front room, but when I was in there just before the fire, a lot of the barrels were gone and there were some old demijohns sitting where the barrels used to be, on a sort of a platform.

Cross-interrogatories.

Q. At the time you mention of having been in Black's saloon at Long Beach, Washington, and some time prior thereto, were you and Black on friendly terms?

A. Black got sore at me several times but I never had any grievance against him.

Q. Is it not a fact, that for some time prior to June 27th, 1912, that because of your frequently getting intoxicated, and boisterous, noisy and quarrelsome,

(Deposition of Frank Lyniff.)

about saloons, and in particular Black's saloon, that he had refused you liquor, and ordered you off of his said premises?

A. No, he never ordered me off his place or refused me a drink that I know of. I always bought most of my stuff there of him.

Q. Is, or is it not true, that because of his refusing you liquor, and ordering you off of his premises, as stated in question 2, herein, that you threatened him and his business, and to injure him, openly and publicly?

A. No, I never threatened him at all.

Q. At said time hereinbefore mentioned and prior thereto, were you a constant and habitual drinker of intoxicating liquors, and frequently became intoxicated, and involved in trouble therefrom with others?

A. I have had experience drinking intoxicating **[347]** liquors, but I wasn't a habitual drunkard or anything of the sort. I never had much trouble with others.

Q. Is, or is it not true, that about one year prior to June 27th, 1912, at Long Beach, Wash., you were thus involved, for striking and beating your mother.

A. Not at the time stated, but in July, 1912, my mother and I had some trouble which was our business and not anybody else's,—but there wasn't any striking and beating in it.

Q. Were you ever arrested for drunkenness or other criminal acts? A. No.

Q. Who was with you, and who was present, when

(Deposition of Frank Lyniff.)

you were at Black's saloon, on or about June 27th, 1912?

A. Dickinson, the bartender, was the only one there when I was in these times mentioned.

Q. At said times, were you a frequenter of other saloons at Long Beach, Wash., and equally so of Black's saloon?

A. I wasn't a frequenter more than anybody else who is in habit of going in saloons. When I went up town I would sometimes drop in the saloon. I would go to one about as much as the other.

Q. Who requested you to go to Black's and for what purpose?

A. The first time mentioned, June 24, 1912, no one requested me to go in; the other time, the day before the fire I went in to post up a Fourth of July poster.

Q. State whether your observation was casual, or by a personal inspection.

A. My observation was casual. Within a week or so before the fire, I know Black was gone, in Astoria I think, I got a gallon of whiskey there. The kind I wanted was all gone. The barrel was empty, I was told, so I purchased another kind. I noticed then the stock was not what it usually was, and **[348]** when I was in there posting up the 4th of July poster, I said to Dickinson, 'Where's all the stuff gone?' I had the pool hall above Black's place for two seasons and I used to see Black's place almost every day, and I noticed the difference in the stock not being kept up.

(Deposition of Frank Lyniff.)

Q. If you state it was a personal inspection, was it by an examination of each barrel, case or bunch of articles separately, if so for whom and the reasons therefor. A. Answered in #10.

Q. Was you associated or in any way connected with any other saloon-keeper at Long Beach, Wash., working against Wm. Black, in an endeavor to injure his business? A. No.

(Signed) FRANK LYNIFF." **[349]**

[Testimony of F. G. Kellog, for Defendant.]

F. G. KELLOG, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. COLE.)

Q. What is your name? A. F. G. Kellog.

Q. Where do you reside?

A. Tacoma, 1122 South J. street.

Q. What is your business?

A. My business principally is the liquor business.

Q. Are you engaged in the wholesale liquor business? A. I am.

Q. How long have you been engaged in such business? A. About thirty years.

Q. Are you familiar with the market value of the different brands of whiskies?

A. Yes, I am. I keep pretty close track of it.

Q. Are you familiar with the increase in value and evaporation of whiskey?

A. Well, I go by the Government tables or allowances for that.

(Testimony of F. G. Kellog.)

Q. Is there any published market reports of the values of the different whiskies at the different ages?

A. Yes, there are several.

Q. I will ask you with reference to Biles' whiskey price list, if that is a standard publication?

A. It is one of the leading ones.

Q. These Biles people are commission merchants?

A. Commission brokers.

Q. They are not interested in the prices except as brokers?

A. That is all, as I understand it. **[350]**

Q. I will ask you whether or not in the trade there is a certain standard fixed for evaporation for different years,—different periods of time.

A. The Government fixes that.

Q. Can you tell what the amount of evaporation of whiskey in wooden barrels would be for a period of six months—six years and four months?

A. I can tell you from the book, by referring to the table.

Mr. LANGHORNE.—I object to his referring to a book. That is clearly hearsay. He can be cross-examined from the book, but he cannot testify direct from it.

The COURT.—This is a price list published in the usual course of trade, one that liquor merchants buy in accordance with?

A. Yes. It is one that the—the Government won't allow only a certain outage, and if it is more, the owner has to stand it. It is supposed to be very nearly correct.

Objection overruled.

(Testimony of F. G. Kellog.)

Q. How often do you get this book?

A. Every thirty days.

Q. What is the date of the issue of this book I show you (indicating)? A. June 25th, 1912.

Mr. LANGHORNE.—Who is that book issued by? The Government? A. By J. W. Biles & Company.

Mr. LANGHORNE.—Liquor dealers?

A. Commission merchants, Cincinnati.

Mr. LANGHORNE.—That book is not purported to be issued by the Government?

A. It has the Government allowances in it. **[351]**

Mr. LANGHORNE.—It is not printed by Government authority?

A. No, sir, it is not printed by Government authority. The Government authorities have nothing to do with it.

Q. (By Mr. COLE.) Are those figures used as a basis for the trade? A. The outage?

Q. Yes. A. Yes, sir.

The COURT.—He may be allowed to testify from that book.

Q. I will ask you what the outage would be on a barrel of Old Crow Whiskey for a period of six years and five months. This liquor he says was dated January, 1906. From that time to the date of the fire would be six years and five months.

A. That would be somewheres from seventy-two to seventy-six months?

Q. Yes.

A. The allowance there is twelve gallons and a half.

(Testimony of F. G. Kellog.)

Mr. LANGHORNE.—That is right, I think.

Q. Now, what would be the outage for a period of three years?

A. Well, it runs from thirty-six to forty months. That would be eight gallons; from thirty to thirty-three months would be seven gallons, seven and a half gallons for thirty-three months and not more than thirty-six months.

Q. Can you state what the market value of Old Crow of 1906 age was in January, 1912?

Mr. LANGHORNE.—Double stamp, add that to it, please.

Mr. COLE.—I do not know whether it was double stamp or not. **[352]**

The WITNESS.—What was the date of the inspection on that?

Q. The whiskey is said to be of the age of 1906, January 2d, 1906.

A. Well, in the spring of 1906 it is quoted at $1.55.

Q. What is that $1.55?

A. That is proof gallons, the original gauge.

Q. Is there anything to be added to that?

A. $1.10 tax and the outage on the barrel. $1.10 and the city and county tax. That varies.

Q. You say that whiskey then in 1912 would be worth about $2.65 a gallon?

A. I would like to correct just one statement here. It is customary where you buy whiskey in bond all charges are paid up to date and that outside of the $1.10 paid to the Government and the outage. Of course, you have to lose that yourself.

(Testimony of F. G. Kellog.)

Mr. LANGHORNE.—I move to strike that out. That is not material to the case.

The COURT.—Motion granted.

Q. What would you say then would be the total market value of such Old Crow in June, 1912?

A. Do you mean by that freed whiskey?

Q. Yes.

A. That would be five-year old whiskey, wouldn't it?

Q. In June, 1906, that would be six years old.

A. It would not be a year old until 1907.

Q. January 1906 to June 1912 it would be six years and five months.

A. That would be about seventy-eight or seventy-nine months. This book has no total in carrying that out. **[353]** I have one in my pocket of Block Brothers that carries the tables up to date. The books are practically the same as far as they go. There is very little difference in them. How many months is that?

Q. That would be above seventy-seven, six years and five months.

A. From seventy-two to seventy-six would cover it?

Q. Yes, approximately.

A. That would be $3.30¾, according to this table.

Mr. LANGHORNE.—Where are you fixing the price at,—here in this country?

A. No, sir, at the bonded warehouse in Louisville.

Q. What is the freight from Louisville to the coast?

(Testimony of F. G. Kellog.)

A. In carload lots, $1.40 a hundred, I think, local, $1.75, I think. The local runs from eighteen to twenty cents. You cannot figure always exactly on freight but it is very close.

Q. I will ask you whether or not this evaporation you spoke of applies to all liquors in wooden barrels.

A. Yes, sir.

Q. This outage you refer to. You stated about twelve and a half gallons for seventy-two months?

A. Yes, sir.

Q. That applies to all liquors kept in wooden barrels?

A. In steam heated warehouses, Government warehouses, it is supposed to.

Q. Would there be any difference in a steam heated Government warehouse and in a saloon building heated by a stove?

A. I should not think so unless it sets close to the stove. **[354]**

Q. It would be approximately the same when it is kept close to the stove?

A. I would not think there would be very much difference in an ordinary heated room.

Q. Do you know how much an empty barrel, an empty whiskey barrel weighs, the barrel that is used?

A. I do not know, but it is marked on every barrel.

Q. They are hardwood, are they?

A. Oak, yes, sir.

Cross-examination.

(By Mr. LANGHORNE.)

Q. Mr. Kellog, you have been in the liquor busi-

(Testimony of F. G. Kellog.)

ness you say for about twenty years?

A. About thirty years.

Q. These prices that you fix on Old Crow 1906 double stamp goods are wholesale prices at Louisville, are they not?

A. Yes. This was quoted from Cincinnati (indicating book).

Q. Yes, I know, but that is the wholesale price at Louisville, Kentucky, three thousand miles away from here? A. Yes, sir.

Q. You say that is $3.50 a gallon?

A. I will have to look again and see.

Mr. LANGHORNE.—Yes, that is your figures.

A. Well, I do not remember. What was the number of months we took, seventy-two to seventy-six?

Mr. COLE.—Yes.

A. $3.30¾.

Q. And to that is to be added seventeen or eighteen cents a gallon for freight charges?

A. Yes, from eighteen to twenty cents, I figured.

[355]

Q. Whiskey increases in value with its age?

A. It does to a certain extent.

Q. For instance, Old Crow will increase in value for six or seven years?

A. Yes, longer than that probably.

Q. What, then, would be the fair market value of Old Crow whiskey,—what would be the fair market value per gallon of Old Crow whiskey here in Tacoma or here in the State of Washington that

(Testimony of F. G. Kellog.)

had been bought in 1906 and held by the dealer until 1912?

Mr. COLE.—I object to that as not competent. This evidence shows this whiskey was bought in 1909.

The COURT.—The jury will be the judges about the testimony in that regard. Objection overruled. Exception allowed.

Q. What would be the fair market value per gallon for it here?

A. That would be an advance of how many years?

Q. Six years, suppose it was of the vintage of 1906.

A. That is what I have been giving you figures on here.

Q. What would be—if a wholesaler or retailer, rather, paid about $4.00 a gallon for it in Louisville, Kentucky, six years ago, what would it be?

A. That would be about $3.30.

Q. And to that you would add the freight?

A. Yes, sir.

Q. How much?

A. $3.50 if he added the freight.

Q. If he paid $3.50 in Louisville, Kentucky, six years ago, what would be the worth of that per gallon here in the State of Washington, on the coast here in June, 1912, [356] what would be the fair market selling value? What is its market value out here after it is shipped out here?

A. Well, it would sell anywhere from four to five dollars a gallon, I suppose.

(Testimony of F. G. Kellog.)

Q. Is that all?

A. That is all I would sell it for.

Q. How many drinks in a gallon of ordinary whiskey?

A. From sixty to eighty drinks, different locations.

Q. You retail that at fifteen cents a drink?

A. From ten to fifteen.

Q. That whiskey increases with age as it gets older, and after it gets to a certain point, then it becomes more valuable? A. Yes, sir.

Q. You are acquainted with Mr. Armstrong of the Olympic Club? A. Yes, sir.

Q. He is a good judge of the value of old liquors, is he not?

Mr. COLE.—I object to that as not competent.

The COURT.—Objection sustained.

Q. You say it would be worth from four to five dollars a gallon?

A. At retail by selling it out by the gallon; then different people and different locations sell it at different prices.

Q. Well, it would sell, then, at a higher market price in a small place where there was no other kind of liquor?

A. Old Crow is considered a high standard whiskey.

Q. Here in Tacoma you might sell it for $4.00 a gallon, and [357] that would be its fair market value but if it was sold down on the ocean it might be $5.00?

(Testimony of F. G. Kellog.)

A. Oh, yes. It varies in the different localities.

Redirect Examination.

(By Mr. COLE.)

Q. Can you tell what the value of Cedar Brook, McBrayer's whiskey, dated 1903 in June, 1912, would be?

(Witness consults book.)

Mr. LANGHORNE.—I may save you some trouble. Is Cedar Brook McBrayer, 1903, now on the market?

Mr. COLE.—In June, 1912, was not the question? It does not make any difference whether it is on the market now or not.

A. There is no 1912 quoted in this book.

Mr. COLE.—1903 is the date.

A. Well, there is no 1903 here. It goes back to 1904.

Q. What is 1904?

A. No quotation only in 1907.

(Witness excused.) **[358]**

Mr. COLE.—I wish to offer in evidence the deposition of R. Blaisdell, taken under stipulation.

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

[Deposition of R. Blaisdell.]

Mr. COLE.—(Reading:)

"Q. State your name and residence.

A. R. Blaisdell, Portland, Oregon.

Q. State what, if any, position you occupy with the Ilwaco Railroad Company.

(Deposition of R. Blaisdell.)

A. I am Auditor of the O. W. R. & N. Railroad Company, part of which was formerly the Ilwaco Railroad Co., and as such I have control of the records of said Ilwaco Railroad Company, now a part of the O. W. R. & N. Company.

Q. State whether or not said Ilwaco Railroad Company has a railroad line from Ilwaco, Washington, to Long Beach, Washington, and operates freight and passenger trains thereon. A. Yes.

Q. State whether or not the Ilwaco Railroad Company ever carried and delivered to William Black, of Long Beach, Washington, any merchandise. If so, give an itemized statement thereof, stating the character and quantity of goods carried and the dates when the same were carried and delivered.

A. Yes, as per itemized statement attached hereto and marked Exhibit 'A.'

Q. State whether or not the Ilwaco Railroad Company ever received from William Black for transportation from Long Beach, Washington, to outside points, any goods, wares or merchandise. If so, state the character and amount so received and the dates thereof.

A. Yes, as per itemized statement attached hereto and marked Exhibit 'B.'

Q. State as near as possible from whom any merchandise was received by the Ilwaco Railroad Company that may have **[359]** been carried to Long Beach, Washington, for William Black and delivered to him at that place by said railroad company.

(Deposition of R. Blaisdell.)

A. All the records we have of the shippers are shown on Exhibt 'A.'

Q. If said railroad company received any merchandise from William Black for shipment from Long Beach, Washington, state when the same was delivered, if possible.

A. All information available is shown on Exhibit 'B.'

Q. Produce, attach to your deposition and mark*ed* Exhibit 'A' for identification, statement, bills or invoices of all goods carried over the Ilwaco Railroad to William Black, at Long Beach, Washington, or from William Black at Long Beach, Washington.

A. Statement of inbound merchandise to William Black is marked Exhibit 'A' for identification and outbound goods from William Black Exhibit 'B' for identification.

(Signed) R. BLAISDELL."

Counsel for defendant proceeds to read part of Exhibit "A-5" to the jury.

Mr. LANGHORNE.—This is not evidence of the facts therein stated. It is simply a bill made by the railroad company. They do not vouch for the correctness of that. I object to its being received in evidence as evidence of any of the things therein stated. It is nothing more or less than evidence of these shipments.

Mr. COLE.—It is important because it would show whether there were any full barrels shipped.

The COURT.—Objection overruled. Gentlemen of the jury, you will understand that this is a record

(Deposition of R. Blaisdell.)

kept by the railroad company and if kept in the ordinary course of their business, dealing with other people or with this [360] plaintiff at a time when there was no trouble on foot or nothing anticipated, it will be admissible in evidence, and you will understand at the same time, so far as its being an entry concerning barrels being empty or partly full, that would be in their interests, that they were keeping track in order to protect themselves against the man whose goods they were shipping and it is not entitled to the same weight with regard to how much was in the barrels that were partly full as to the number of barrels. If there was one gallon out of a barrel it would not be entirely full, and that is going to leave you in doubt to a great extent as to how empty or how full they were.

Mr. COLE.—This statement describes the goods by giving a description of the goods and the weight.

Whereupon said itemized statements were admitted in evidence and marked Defendant's Exhibits "A–5" and "A–6" of this date.

Noon recess.

Mr. COLE.—We wish to offer in evidence the answers of Mr. Black to those interrogatories that were identified by Mr. Black yesterday.

Mr. LANGHORNE.—No objections.

The COURT.—They may be admitted.

Whereupon said answers were admitted in evidence and marked Defendant's Exhibit "A–7" of this date.

Mr. COLE.—We wish to offer in evidence this

(Deposition of R. Blaisdell.)

inventory that Mr. Kayler testified yesterday that he made in connection with this sale.

Mr. LANGHORNE.—For what purpose, may I ask? [361]

Mr. COLE.—Well, the object is to show that this inventory was not made for the purpose of that sale but for the purpose of making out the policy.

Mr. LANGHORNE.—What?

Mr. COLE.—For the purpose of showing it was made out for the purpose of writing that policy and not for any sale.

Mr. LANGHORNE.—No objections.

The COURT.—It may be admitted.

Whereupon said inventory was admitted in evidence and marked Defendant's Exhibit "A–8" of this date.

Mr. COLE.—I would like to offer in evidence the deposition of Mr. Ebon Parker.

The COURT.—Taken under stipulation?

Mr. COLE.—Yes.

The COURT.—It may be admitted.

[Deposition of Ebon P. Parker.]

Mr. COLE.—(Reading:)

"Direct Examination.

Q. State your name, age, residence and occupation.

A. Ebon P. Parker, or E. P. Parker; I will be 59 years old the last day of November.

Q. Residence?

A. Astoria, Oregon, Clatsop County.

(Deposition of Ebon P. Parker.)

Q. Occupation? A. Hotel-keeper.

Q. What is the name of the hotel that you keep at Astoria? A. Parker Hotel.

Q. How long have you been the proprietor and keeper of the said hotel?

A. About five years, this time.

Q. The past five years, you say?

A. Yes, sir.

Q. Are you acquainted with William Black, the plaintiff? A. Yes, sir.

Q. How long have you been acquainted with him?

A. Well, it has been a number of years that I have been acquainted with him; I think he was engineer on the railroad the first time I got acquainted with him, over there at Ilwaco.

Q. Were you acquainted with him during June, [362] 1912? A. Yes, sir.

Q. Did you see William Black during that time?

A. Yes, sir.

Q. State when and where.

A. At the Parker Hotel; he had room 44 on the —24th, 25th and 26th.

Q. Go on and state what month and year.

A. That was in June, 1912.

Q. In giving the dates, what do you refer to?

A. I refer to the Register and the Bed Book.

Q. Was William Black stopping in Astoria, Oregon, during this entire part of the time?

A. Yes, sir.

Q. When did you see William Black last upon the evening of the 26th of June, 1912?

(Deposition of Ebon P. Parker.)

A. At twelve o'clock, at midnight, close to twelve o'clock, it was close around twelve.

Q. State the circumstances that occurred at the time you saw him.

A. Well, I showed him his room that time, and then in the morning they rang up and wanted to find him—I presume they called him and they had a telephone message for him—and I went up and called him, and he came down in the office.

Q. Speaking of the morning, what morning was that? A. The morning of the 27th.

Q. State how you know that he was, during those three days, all the time in Astoria?

A. Well, I was talking to him every day and then I saw him in the evening when he went up to his room.

Q. What time did he usually go to bed?

A. About twelve o'clock, along about twelve o'clock.

Q. Twelve o'clock? A. Yes, sir.

Cross-examination by Mr. WILKINS.

Q. Mr. Parker, you say it was the 24th, 25th and 26th of June? A. Yes, sir.

Q. —that he was there? On the 24th, did he come to the hotel? A. Yes, sir.

Q. Do you know where he came from?

A. Seaside.

Q. From Seaside? A. Yes, sir.

Q. He told you that, did he? A. Yes, sir.

Q. You say [363] he was stopping all that time at the hotel? A. Yes, sir.

Q. How often did you see him?

(Deposition of Ebon P. Parker.)

A. Well, I saw him every day; I was in the office every day from six in the morning; he generally came down in the morning about six and half-past six, he was a pretty early riser.

Q. Were you around the hotel all the time?

A. Yes, sir, all the time.

Q. What hours?

A. I was there from half-past five in the morning until twelve at night, unless I would go up the street, I slept there.

Q. You slept in the hotel?

A. Yes, sir; I would go to bed about twelve o'clock.

Q. Now, you say you saw him the night of the 26th at— A. About twelve o'clock, yes, sir.

Q. How do you happen to remember?

A. Because I had it in my bed book and know when I called him the next morning.

Q. I understand about the next morning, but at night?

A. Well, because we went to bed together.

Q. Couldn't it have been ten or eleven o'clock?

A. No, sir, no.

Q. Are you sure about the exact time?

A. Pretty close to twelve o'clock, yes, sir.

Q. Pretty close?

A. Close to twelve o'clock; I would always go to bed about twelve o'clock; after the trains get in and all that, I would generally go to bed, and we went to bed when he was there—he was a great fellow to talk and we used to talk a good deal about old times.

(Deposition of Ebon P. Parker.)

Q. Did you see him after that?

A. After the—

Q. After he went to bed?

A. Not until the next morning.

Q. You don't know, of course, whether he was in his room during, after—

A. Well, he was when I called him in the morning.

Q. But between the time he went to bed and the next morning, you did not see him, of course?

A. No, sir. **[364]**

Q. The next morning, did he leave?

A. They called him—they called him—a telephone message came in for him and I went to the room and called him, and he came down and answered the telephone and told me, 'By God! My place burned up!'—he talked to friends across the river, then he said he would go and catch this boat to go over on, the 'Nahcotta,' and I think he was going to take the 1:45 boat to go across after dinner, anyway, sometime he was going to go; just after he left the house, a policeman came in, the Chief of Police came in and wanted to know if Mr. Black was there, and I told him, 'Yes, he had just gone up to go across the river, his place burned up.'

Q. What did the policeman say he wanted with him?

A. He didn't tell me what he wanted with him.

Q. Did he say he had a warrant?

A. He didn't say he had a warrant; I described him, the clothes he wore, and he told me, 'I think I

(Deposition of Ebon P. Parker.)

passed him going up the street.' I told him, 'You will find him at the O. R. & N. Co. dock, he is going right over.' The policeman told me afterwards, though, in the afternoon when he came down, that he had a warrant for him, see.

Q. You have known Mr. Black a long time, have you? A. Yes, sir.

Q. You have always been friendly with him, have you?

A. Always been friendly, always been; he always stayed at the hotel when he came through; he was there on the 20th of that month and went to Seaside; he was down to Seaside two or three days looking around, then he came back; he told me he was going to Seaside and went down there and when he came back, he stayed there a couple, three days.

Redirect Examination by Mr. BRUMBACH.

Q. What hour was [365] it, usually, that Mr. Black went to bed?

A. Well, he went to bed, along about twelve o'clock when he used to go to bed.

(Signed) EBON P. PARKER."

Whereupon attached invoice was admitted in evidence and marked Defendant's Exhibit "A-9" of this date.

Mr. COLE.—I wish to offer in evidence the deposition of J. B. Longini taken under stipulation.

The COURT.—It may be admitted.

[Deposition of J. B. Longini.]

Mr. COLE.—(Reading:)

"Q. State your name and residence.

(Deposition of J. B. Longini.)

A. My name is J. B. Longini. I reside at Chicago, Illinois.

Q. State what, if any, position you hold with the firm of Sunny Brook Distillery Company.

A. I am creditman.

Q. State whether or not William Black, of Ilwaco, or Long Beach, Washington, ever ordered from the Sunny Brook Distillery Company any goods consisting of wines or liquors. If so, state whether or not said goods were shipped in pursuance of the order, and if shipped, to whom they were shipped.

A. Yes, William Black did order liquors from Sunny Brook Distillery Company, and said liquors was shipped in pursuance to the orders. The first bill of goods was August 1st, 1905, for ten barrels of Sunny Brook; five barrels #16,415 were shipped to Blummauer & Hoch, Portland, Oregon, on Nov. 11, 1908; and five barrels #19,162 were shipped under said order to Boltz & Wennig, Seattle, Washington, on September 29, 1909. The second bill of goods, which was bought on or about January 11, 1907, consisting of fifteen barrels of Sunny Brook, five of which were shipped to Blummauer & Hoch, Portland, Oregon, on November 11, 1908; five barrels #322,256 were shipped to Boltz & Wennig, Seattle, Washington, on April 2, 1909; **[366]** five barrels #305,257 were shipped to D. A. Hunt, Raymond, Washington, on March 17, 1909.

Q. State what, if any, liquors or wines were sold to William Black, of Long Beach, or Ilwaco, Wash-

(Deposition of J. B. Longini.)

ington, by the Sunny Brook Distillery Company, and give the date of any such sale and the price received therefor.

A. On August 1, 1905, ten barrels of Sunny Brook Whiskey were sold to William Black, by the Sunny Brook Distillery Company, at $.75 per gallon or $358.32 for which the Sunny Brook Distillery Company received eight notes of $44.79 each, the first maturing October 15, 1905, and one each month thereafter, which notes have been paid; and a further order was received by the Sunny Brook Distillery Company, on or about January 11, 1907, for fifteen barrels of Sunny Brook at $.80 per gallon, or $586.08, for which the Company received twelve notes of $48.84 each, the first maturing March 1, 1907, and one each month thereafter and all of said notes have been paid.

Q. State by whom the price was paid for any goods shipped by the Sunny Brook Distillery Company to William Black, of Ilwaco, or Long Beach, Washington.

A. The price for said goods above mentioned was paid by notes of William Black.

Q. State whether or not the shipments were made direct to William Black, at Ilwaco, or Long Beach, Washington.

A. The shipments were not made to William Black direct, but were shipped as set forth by my answer to the third interrogatory.

Q. State whether or not the price paid for any goods shipped by the Sunny Brook Distillery Com-

(Deposition of J. B. Longini.)

pany to William Black, included the freight.

A. The price paid did not include freight.

Q. State by whom [367] the freight was paid on any goods shipped by the Sunny Brook Distillery Company to William Black of Ilwaco, or Long Beach, Washington.

A. I do not know by whom the freight was paid on any of the goods above referred to; but it was not paid by the Sunny Brook Distillery Company. The goods were shipped from Louisville, Kentucky, the freight to be collected from the consignee.

Q. Produce, attach to your deposition and mark Exhibit 'A' for identification, statement or invoice of all goods sold by the firm of Sunny Brook Distillery Company to William Black, of Ilwaco, or Long Beach, Washington.

A. Attached herewith are invoices of all goods sold by the firm of Sunny Brook Distillery Company to William Black, of Ilwaco or Long Beach, Washington, which invoices are marked Exhibit 'A.'

(Signed) J. B. LONGINI."

Whereupon attached invoice was admitted in evidence and marked Defendant's Exhibit "A-10" of this date.

Mr. COLE.—We will call Mr. Black to the stand.

Mr. LANGHORNE.—Do you call him as your own witness?

Mr. COLE.—Yes, sir.

Mr. LANGHORNE.—Let the record show that he called him as his own witness. [368]

[Testimony of William Black, for Defendant.]

WILLIAM BLACK, plaintiff herein, having been heretofore sworn, now being recalled, testified on behalf of defendant as follows:

Direct Examination.

(By Mr. COLE.)

Q. You bought a good deal of beer in bottles down there? A. A good deal of beer; yes, sir.

Q. And you returned a good many empty bottles?

A. Yes, sir.

Q. What credit were you allowed for the empty bottles?

A. Forty cents a dozen. I paid the freight.

Mr. LANGHORNE.—No questions.

(Witness excused.)

Defendant rests. [369]

And the plaintiff, to further maintain the issues on his part, introduced the following evidence in rebuttal:

[Testimony of William Black, in His Own Behalf (Recalled in Rebuttal).]

WILLIAM BLACK, recalled for further examination, testified in rebuttal as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. You just heard this deposition read about the Sunny Brook Whiskey, I believe? A. Yes, sir.

Q. I believe you testified on the stand on direct examination that you never did have any Sunny Brook?

(Testimony of William Black.)

A. No, sir, I never had any. I bought it but I sold it, sold the certificates to Blumauer & Hoch. I never handled it. I never saw it.

Q. Directing your attention for a minute to the insurance policy for $2,000 that was formerly carried by Mr. Loomis, I will ask you if that policy covered anything in your warehouse.

A. No, sir, it did not. I had no insurance on the warehouse at all.

Q. What was in the warehouse at the time the $2,000 policy was in existence?

A. I had about $4,000 worth of liquors in there.

Q. I am talking now about when it was you moved the liquors from the warehouse into the saloon that was destroyed by fire; when was that?

A. In May.

Q. I believe that is the time that the carpenter testified to.

A. Yes, when they were working there, about that time. [370]

Q. It has been insinuated here that you burned this building. I wish you would kindly tell the jury what you were worth in June of last year.

Mr. COLE.—I do not think that is material.

The COURT.—Objection overruled. You will understand, gentlemen of the jury, this is only admitted as a circumstance. If the plaintiff was in desperate straits, pressed in the manner that has been indicated in the evidence, about the agitation down there for the County to go dry,—that was allowed to go in as a possible motive why a desperate

(Testimony of William Black.)

man might burn his place down. Now, on the same line of reasoning, the Court permits the plaintiff to tell what his financial condition was. If he was in good circumstances,—it would be less likely that some man would burn a building than if they were in strained circumstances, and you will consider this for no other purpose.

Mr. COLE.—We do not claim he burned it because he was in straitened circumstances. We admit that he is well off financially. We do not charge that he did burn it because he was in straitened circumstances, so I do not think it is admissible.

Objection overruled.

Q. Tell the jury what your circumstances were in June of last year.

A. Well, possibly $50,000.00.

Q. Did you owe anything in June of last year?

A. Yes, I did.

Q. I will ask you if since this fire you paid up what you owed on your stock? **[371]**

A. Yes, sir.

Q. Do you owe any firm any sum of money now?

A. One man claims I owe him.

Q. How much?

A. $5—$4.50, Mr. Hazeltine.

Q. Now, this building that was burned, did you recently have any work done on that?

A. Yes, sir.

Q. What was it you had done?

A. I had the Anderson brothers build a concrete basement and I had cement piers put under there.

(Testimony of William Black.)

Q. Why did you have cement piers put under there?

A. On account of the weight of the building, and I also had extra floor joists on the lower floor. I did not change the floor joists. I had an extra one put in, and I also had an office built and other fixings.

Q. How long did you own that building?

A. It was a new building and I think it was started in 1909.

Q. What was the reasonable value of that building in June of last year?

A. The building cost me a little over $4,800 all told the way it stood.

Q. What was the reasonable value?

A. Well, of course, this building was a building built by days' work; it was not built by contract; it was built extra strong with double floors on the lower floor.

Q. What would you say was its reasonable value?

A. Probably it cost a little more the way I had it done. Probably the building was worth $4,000.

Q. When was it that you had this concrete work done? **[372]**

A. I had the concrete work done on that in April.

Q. Of what year? A. 1912.

Q. Now, Mr. Black, there has been introduced here a statement of shipments over a railroad from Ilwaco to Long Beach. I want you to tell the jury first something about the topography of the ground, the land down there on which Ilwaco, Nahcotta and Long Beach are situated. What is it?

(Testimony of William Black.)

A. We are on a peninsula which faces the beach, ocean beach on one side and the other is Willapa Bay, makes a neck in there.

Q. And you are in between there?

A. Right in between there, and then there is a bay right down below Long Beach in front of Ilwaco called Baker's Bay. It is near the mouth of the Columbia River.

Q. I will ask you if you have made a sketch of the topography of the land (handing witness paper)?

A. As near as I could make it, yes, sir.

Q. Is that fairly correct (indicating)?

A. Yes; that is as good as I can make it. This is Willapa Bay (indicating); this is South Bend over there (indicating) on Willapa River. Here is the bar (indicating); right up here is Oysterville (indicating) and down here is Nahcotta and there is the steam road that runs from South Bend to Nahcotta (indicating all along). There is a long dock that runs out here (indicating) to Ilwaco Bay, and the city of Ilwaco built a city dock. The railroad has since practically abandoned that dock and continued a road up to a place called Meglers on the [373] Columbia River up here (indicating).

Mr. LANGHORNE.—That is enough. I wanted to get the situation before the jury. I will offer this in evidence for the purpose of illustrating the testimony of the witness.

No objections.

The COURT.—It may be admitted.

(Testimony of William Black.)

Whereupon said sketch was admitted in evidence and marked Plaintiff's Exhibit 7 of this date.

Q. Shipments would come to your place in other ways and manners than was indicated by these sheets that were introduced? A. Yes, sir.

Q. Shipments coming from the east by way of the Northern Pacific, where would they branch off at for your place?

A. I will explain this whole business about this freight,—some wholesalers routed it over the Northern Pacific and it would be unloaded at Kalama and then it would come down on the steamer and they would land it in Astoria, and other freight came around by South Bend.

Q. By Chehalis?

A. Yes, depends on what route the shippers had shipped it over. From San Francisco most of the freight came up by steamer. It was cheaper freight, various lines, sometimes one line and sometimes another. Here is an instance where I had some Roxbury Rye come from—(interrupted).

Mr. LANGHORNE.—I do not care about a lengthy explanation. What I want to know is whether it came to your place to Long Beach other than by the railroad, shipped by the **[374]** railroad from Ilwaco.

A. Yes, that is what I am trying to tell the jury.

Q. That is all I want to know. Did you also have freight coming to you from Ilwaco other than by this railroad? A. Yes, sir.

Q. How?

(Testimony of William Black.)

A. A man by the name of Haggbloom started an opposition line against the railroad and the citizens of Ilwaco, and the people fell out with the railroad company and wanted to support this line, this man, and this man came into my place with Mr. Jacobson and interviewed me and others and wanted to know if we would give him our freight, and I signed up and I gave him my freight, all that came up by steamer, and it was hauled up to Long Beach by wagon.

Q. When you removed your stock of goods from Ilwaco to Long Beach, were any barrels of whiskey transported to Long Beach other than by freight?

A. A man by the name of Knowels hauled up five barrels I had stored, five barrels of liquor that had never been tapped.

Q. How far is it from Astoria to Ilwaco across the bay?

A. From Ilwaco I should judge it was over twenty miles. I am not much of a judge on water, though.

Cross-examination.

(By Mr. COLE.)

Q. You say you had some of your shipments come by South Bend? A. Yes, sir.

Q. Will you name one of them? **[375]**

A. Yes, Roxbury Rye, that shipment of Roxbury Rye came that way from Seattle.

Q. How many cases did you get?

A. I forget how many there was, some of them were broken; they were in bad order; I do not re-

(Testimony of William Black.)

member. There was some difficulty with the company about that.

Q. You got a certain number of cases in that shipment? A. Yes, sir.

Q. How many?

A. Well, I forget. There was some missing.

Q. Fifty or thirty? A. Thirty cases, yes.

Q. And they came over the Northern Pacific?

A. No,—they came over the Northern Pacific into South Bend, yes, sir.

Q. What other shipments did you get?

A. Well, my friend, I cannot remember these things. I have been in business a long while—(interrupted).

Q. Can you name any other shipments that you got through South Bend?

A. I got liquor from Haggerty from Seattle.

Q. That came by South Bend?

A. That came that way, yes, sir.

Q. That was eight years ago, ten years ago?

A. Well, now, I dealt with Mr. Haggerty while I was in Ilwaco.

Q. That didn't come by South Bend?

A. It came that way, yes, sir.

Q. What else did you get by South Bend?

A. I got cigars from Seattle that came that way and other [376] stuff; I do not remember now the different shipments I got, but I got considerable goods from that way at different times.

Q. You do not remember when you bought those thirty cases of Roxbury Rye, do you? You bought

(Testimony of William Black.)

those in the fall of 1911, didn't you?

A. I think so, yes.

Q. You received those cases of Roxbury Rye over the Ilwaco railroad on the 7th day of November, 1911, didn't you?

A. I did not receive thirty cases, sir.

Q. How many did you receive?

A. Well, I think there was something like four cases; that is, it amounted to that; it was stolen and broken.

Q. The other twenty-six were gone? You say you received four cases?

A. No, I said there was about that many damaged.

Q. You received them, though, didn't you?

A. Yes, I received them with a statement of that kind, bad order.

Mr. LANGHORNE.—I object to that as immaterial, whether or not the cases were broken or what.

The COURT.—Objection overruled. It tests the memory of the witness.

Q. You got the cases just the same?

A. No, sir, some short.

Q. How many did you get?

A. It amounted to four and a half cases broken and some stolen.

Q. Was this half a case short too or was it broken? [377]

A. In one case there was nothing but broken bottles.

Q. Do you mean to tell the jury you did not get any damage cases?

(Testimony of William Black.)

A. I got some of them but I never received thirty cases.

Q. Is it not a fact that you received thirty cases including what were good and what were damaged?

A. No, sir.

Q. Did you make any claim on the railroad company that time?

A. I let the firm whom I bought from settle that with them.

Q. Did you ever buy any other shipment of thirty cases of liquor?

A. I might have done so in my time.

Q. You would not swear to it, would you? You say these thirty cases of liquor you received from the Ilwaco Railroad Company on the 11th of November, 1911—on the 3d day of November, 1911,—

A. That must be the Roxbury Rye but I did not sign for thirty cases.

Q. If you said you got thirty cases of Roxbury Rye by way of South Bend, you were mistaken, were you not?

A. I got it by way of South Bend. It came that way by South Bend and the O. W. R. & N. transferred to the boat and from the boat to the railroad at Nahcotta.

Q. What else did you get?

A. In that shipment?

Q. Yes.

A. That is the only thing I got that came from those people.

Q. Did you get most of your goods by way of haul-

(Testimony of William Black.)

ing by wagon or over the railroad? Where did you get the most? [378]

A. I guess I got the most by railroad.

Q. Then if these cases were taken to you at Long Beach by way of South Bend or Ilwaco railroad, you received them anyway? A. Sure.

Q. They should be included in these liquors?

A. They should be.

Q. When you signed up this contract with this man to haul freight, where did you agree that he would haul your freight?

A. I do not remember; it was when he was running there.

Q. In 1910? A. 1910 I guess it was.

Q. Was it 1911 or later? A. 1910.

Q. You do not demember much about it?

A. 1910 I think it was. I remember I signed a contract and I remember that he hauled the goods; I remember that I lived up to it with him.

Q. What kind of a contract was it?

A. Just an agreement that he could get the steamer freight.

Q. For how long a time?

A. I disremember the time but I know I lived up to it.

Q. How long did you live up to it?

A. I lived up to it as long as,—I guess it was a couple of years.

Q. You lived up to it until the time you burned out? A. As well as I could, yes, sir.

Q. You signed this contract in 1910 and he hauled

(Testimony of William Black.)

most of your freight up to the time you burned out? **[379]**

A. I would not be positive. It was 1910. It was when he ran there.

Q. It could not be any earlier than that, could it?

A. Well, I would not be positive. It might have been earlier and it might have been later.

Q. You signed a written contract?

A. I signed a written contract, yes, sir.

Q. Did he haul any whiskey for you?

A. Yes, sir.

Q. How many barrels?

A. I do not remember.

Q. Would he handle a dozen?

A. I could not state.

Q. Would he handle five?

A. Say, I do not remember how many he did haul for me.

Q. You say he did handle some, did you?

A. I know he did. He paid the freight over there and collected from me.

Q. What else did he handle besides whiskey?

A. Beer and ice and soda water and other stuff.

Q. What did you pay per barrel for that beer, about $9?

A. I bought it in five barrel lots. I think I paid either forty or forty-five dollars, I would not be certain as to that; it was something like forty dollars I think. I think that was the rate on it.

Q. Then you got a credit back of $2.40 for empty bottles?

(Testimony of William Black.)

A. What bottles I had why, yes, I bought lots of bottles.

Q. When you told the jury the shipments over the Northern Pacific by way of South Bend were not included in this you were mistaken (indicating)? **[380]**

A. I have never looked at that list there (indicating).

Q. Let us get back to this whiskey you moved into your saloon in May; how many barrels did you move in; have you any idea as to the number or have you forgotten?

A. I have forgotten what I moved in there.

Q. You did not show them to the assessor?

A. No, sir.

Q. You did not tell him that they were out there, did you? A. No, sir.

Q. How long had they been out there?

A. Well, they had been out there ever since the building was built.

Q. Do you know when they built that building?

A. Possibly four years.

Q. They were put in there at the time you moved there? A. Shortly afterwards, yes, sir.

Q. Were any of them full?

A. Yes, they were untapped.

Mr. LANGHORNE.—I want to object to this as not recross-examination.

The COURT.—There is a part of it that was not, but there is nothing before the Court now.

(Testimony of William Black.)

Q. In regard to this building, you say it cost $4,800.

A. Cost me $4,800, that is what it cost me.

Q. When you bought it, what did you pay?

A. $2,500 for the building and three lots—(interrupted).

Mr. LANGHORNE.—I object to that as absolutely immaterial.

The WITNESS.—I will answer that.

Q. Go ahead and answer.

A. I paid $2,500 for that property and gave the houses [381] away; that is, there were three old shacks and I gave them to somebody to move them off and the other building I tore down. It was nothing but an old shack. I did not consider the buildings on that land worth a cent. There were three lots, I paid $2,500 for.

Q. Do you mean to tell the jury you built that saloon building new? A. Yes, sir.

Q. Absolutely new?

A. With the exception of the foundation on the lower floor. There was a new foundation there.

Q. Who was the contractor?

A. There was no contractor; it was built absolutely by day's work.

Q. Did you have some carpenters?

A. I had carpenters.

Q. Who were they?

A. Too numerous to mention, some of them were good and some of them—(interrupted).

Q. What year did you start in building it?

(Testimony of William Black.)

A. I think it was in 1909.

Q. How long did it take you to build it?

A. Some time, I do not remember how long.

Q. Finished it that year?

A. Yes, sir, finished it that year; there was a lot of work on it.

Q. You mean to say that you gave away all the buildings on this land when you bought it?

A. With the exception of the old building I tore down and I gave some of that stuff away and some of the boards I [382] sold. A fellow gave me some carrots for it. I had an old horse and he gave me a lot of those and the rest of it I burned.

Q. You built this new building in 1909?

A. I think that is the year. I would not be positive.

Q. Could it be 1910?

A. I came there in 1908 and I think in 1909 it was finished. I would not be positive to that but I think it was as near as I can remember.

Q. What did you use for your saloon when you first came there?

A. I used this building that was there on the place and built this other building on over this building. This old building is right inside of the other.

Q. Isn't it a fact that you did nothing but remodel that old building at a cost of three or four hundred dollars? A. No, sir, that is not a fact.

Q. You built the new building over the old building? A. Right over the old building.

Q. Did you take the old building out?

(Testimony of William Black.)

A. You bet I did!

Q. After the new one was finished? A. Yes, sir.

Q. How did you move it out?

A. The people who worked on it tore it out as fast as they could.

Q. Were any Long Beach carpenters working on that building? A. Yes, sir.

Q. Who were they?

A. A man by the name of Greenbloom, two men by the name of [383] Hall, a man by the name of Gould.

Q. Did Mr. Wray have anything to do with it?

A. Mr. Wray done some work for me consisting of putting in I think a mission back bar—(interrupted).

Q. He is the carpenter who testified here yesterday?

A. Yes, a back bar, and they passed a new state law ordering the windows to be a certain height from the sidewalk and he took the windows out. I ordered them glass windows and Mr. Wray put them in, and the stairs did not suit me going upstairs, in place of going up from the inside I had them moved, and he did some finishing work—(interrupted).

Q. Never mind, that is enough of that. Did Mr. Wray help on the new building?

A. Only after it was built, a little on the inside finishing.

Q. You didn't use any of that old building in making your new one?

A. The only thing that is in that building of the old building is an independent floor, an independent

(Testimony of William Black.)

foundation. That building had a new foundation under it. It was an old building with a new foundation under it, heavy timbers; it is an independent foundation of itself outside of the one that was already on there.

Q. You used them both? A. Yes, sir.

Q. That is all of the old building that you left there, just the foundation?

A. Just the foundation, that is as I remember it now. If there is anything more, I do not know about it. They might have used some pieces of blocks and some little [384] things I do not remember. I was busy at other business. I know that the building cost me about $4,800, paints and everything.

Q. Did you make an inventory of that for the insurance company, the cost of it?

Mr. LANGHORNE.—Of what?

Mr. COLE.—This building, material and labor,—he said it cost $4,800.

Mr. LANGHORNE.—I object to that as immaterial.

Objection overruled.

Q. Did you make an inventory?

A. About the cost of the building?

Q. Yes.

A. I think I did. I do not remember whether I did or not but I think I did.

Q. Did you make an inventory of the amount of material and the work that went into it?

A. I had no record of the amount of work or material.

(Testimony of William Black.)

Q. Any inventory you fixed up when you made your policy would be based on your recollection, would it?

A. Not in regard to the lumber. I tried to describe the building, give them the length and all the information I could give them about it. I would like to explain something in that building. I had it shingled over the rustic around the upper story afterwards. We have very heavy winters there and I had a lot of extra work done on that building and it cost me more than it probably would if I had had it built in the first place. You see, putting the building over the other building made the cost a little more. **[385]**

Redirect Examination.

(By Mr. LANGHORNE.)

Q. Did you have a policy of insurance on this dwelling-house, on the saloon building?

A. Yes, sir.

Q. How much? A. When it burned down?

Q. Yes. A. $2,000.

Q. Was it paid? A. Yes, sir.

Q. What company?

A. The Manchester, you bet!

Q. Have anything on the— A. Yes, sir.

Q. How much? A. $1,000.

Q. Was it paid? A. Yes, sir.

Q. That was a different company from this?

A. That was a different company from this; yes, sir.

(Witness excused.) **[386]**

[Testimony of Joe Anderson (Recalled in Rebuttal).]

JOE ANDERSON, recalled for further examination, testified in rebuttal as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. What did you say your occupation was?

A. Carpenter and builder.

Q. How long?

A. Oh, I have been in that business for six years, I guess.

Q. Are you acquainted with the saloon building of Mr. Black? A. Yes, sir.

Q. From your experience as contractor and builder, tell the jury what the reasonable value of that building was in June of last year.

A. Well, I believe I could build a building like that for $4,000.

Cross-examination.

(By Mr. COLE.)

Q. Did you help build that building?

A. No, sir. I done quite a little work after they built it.

Q. You are just giving your estimate then from your knowledge of the value of real property?

A. Well, I tore down a part of the inside. I know how the building was built and I watched the building when they built it so I know about what lumber went in the building and I know it was all Number 1 lumber, probably cost twenty-eight or thirty dollars

(Testimony of Joe Anderson.)

a thousand. I do not believe you could build that building for less than $4,000.

Q. Do you know the amount that went into it? **[387]**

A. Not exactly, no, sir. I know the size of the building.

(Witness excused.)

Mr. LANGHORNE.—I would like to substitute a map with the consent of counsel in place of that diagram.

Mr. COLE.—This map will be all right, I think the map will be more accurate.

The COURT.—Very well.

Whereupon said map is substituted for Plaintiff's Exhibit Number 7. **[388]**

[Testimony of Henry Kayler (Recalled in Rebuttal).]

HENRY KAYLER, recalled for further examination, testified in rebuttal as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. Whose signature is that (indicating)?

A. It is from the Davenport-Dooley people.

Q. They are the agents of this defendant company? A. Yes, sir.

Q. When you wrote this policy of insurance, you made an immediate report of it to Davenport-Dooley & Company, the general agents? A. Yes, sir.

Q. And this is the letter you received, is it (indicating)? A. Yes, sir.

(Testimony of Henry Kayler.)

Mr. LANGHORNE.—I will offer this in evidence.

No objections.

The COURT.—It may be admitted.

Whereupon said letter was admitted in evidence and marked Plaintiff's Exhibit 8 of this date.

Mr. LANGHORNE.—This is under date of June 24th, 1912, from the Davenport-Dooley Company to Henry Kayler (reading):

"Noting on the back of this report building is lighted with gas lamps. We believe that the usual gasoline lamp permits should be made a part of the policy and will appreciate your favoring us with the usual endorsements. Thanking you very much for the fine line of business, we remain,

Very truly yours,

DAVENPORT-DOOLEY & COMPANY,

DIXWELL DAVENPORT."

(Witness excused.) [389]

[Testimony of Theodore Jacobson (Recalled in Rebuttal).]

THEODORE JACOBSON, recalled for further examination, testified in rebuttal as follows:

Direct Examination.

(By Mr. LANGHORNE.)

Q. You were a merchant in Long Beach quite a while? A. Yes, sir.

Q. What do you know about the transportation facilities about the merchants receiving their freight, whether by railroad or otherwise?

A. Both ways, that is, by way of railroad or

(Testimony of Theodore Jacobson.)

around by the boat from Astoria.

Mr. COLE.—I object to that as immaterial.

Objection overruled.

Q. Do you know about the merchants signing up with some private individual to bring in their freight from Ilwaco? A. Yes, a great many of us did.

Q. You were one of them?

A. Yes, I was acting in the capacity of agent for Mr. Haggbloom.

Q. Were you signed up?

A. About the same time I took Mr. Haggbloom up to Mr. Black.

Q. Do you know when it was?

A. I do not remember, but it strikes me it was 1909; I would not be positive.

Q. About that time?

A. Yes; I was running a grocery store there.

Q. It was a contract whereby you and Mr. Black agreed that this fellow should haul all your freight? **[390]**

A. No, it was not a contract in a way, it was an agreement to stand by Mr. Haggbloom to get him enough business to pay him to run his boat across.

Q. Your agreement was different from Black's?

A. About the same.

Q. Did you hear him testify that he agreed to give all of the freight?

A. Yes, that was the sum and substance of it; we intended to patronize him all we could.

(Witness excused.)

Plaintiff rests.

Whereupon, counsel for the defendant made a motion for an order of the Court directing the jury to return a verdict in favor of the defendant, on the ground that the evidence showed conclusively that the plaintiff was guilty of false swearing in connection with his loss in violation of the terms of the policy, and therefore the policy was void; which motion was denied by the Court, to which ruling of the Court the defendant excepted and the exception was allowed.

WHEREUPON, the defendant, in writing, requested the Court to instruct the jury as follows:

[Instructions Requested by Defendant.]

(3) The insurance policy in this case provides that the entire policy shall be void if the insured shall be guilty of any fraudulent or false swearing touching any matter relating to the insurance or the subject thereof, whether before or after loss. If you find from the evidence that the plaintiff in this case has willfully, or carelessly, made claim for loss exceeding **[391]** the true market value of the property destroyed in the fire and made affidavit to the same, then in that event he cannot recover in this action. False swearing consists of stating a fact as true which the party does not know to be true. If the plaintiff has inserted in his sworn proof of loss any articles as burned which were not burned and knowingly puts such false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover.

(4) If appears from the evidence in this case that

the plaintiff on or about the 25th day of August, 1912, submitted to the defendant a sworn proof of loss, wherein the plaintiff claimed that the value of the property destroyed in the fire and covered by the policy amounted to the sum of $7,378.87. If you find from the evidence that the plaintiff knew the property destroyed in the fire was of a value substantially less than that amount, or that he could, by the exercise of reasonable diligence, have known that said property was of substantially less value, he cannot recover in this action, even though the actual market value of the property exceeds the sum of five thousand dollars.

(6) If you find from the evidence that the plaintiff has inserted in his sworn proof of loss articles not covered by the policy and which were not insured by the policy, then your verdict should be for the defendant.

(10) If you find from the evidence that the plaintiff in his sworn proof of loss, placed an excessive valuation on the whole property burned, or on single portions or quantities thereof, and that such excessive claim was wilfully or carelessly made, then your verdict should be for the defendant.

(11) The jury is instructed that there is no evidence as **[392]** to the market value of the case goods and therefore they must be eliminated.

The Court thereupon gave the following instructions to the jury:

[Instructions.]

GENTLEMEN OF THE JURY:

It is the duty of the Court to instruct you regard-

ing the law. There has been a large number of exhibits admitted in this case, documents of various kinds, and other things. You will take these to your jury-room when you retire to consider your verdict and you will also take with you the pleadings in the case. It is your duty to examine the pleadings in order to determine just what they allege and admit and deny. In order that you may have the matter more clearly in your minds while these instructions are being given, I will give you a brief summary of what the pleadings set up.

Mr. Black, the plaintiff in the case, comes into court with his complaint and alleges that on a certain date in June last year, mentioned in the complaint, that he owned a certain stock of liquors and cigars at Long Beach, Washington; that he took out an insurance policy on them with the defendant company for $5,000; that after that time he had a fire; that his building burned down and that his liquors **[393]** and cigars and this stock was destroyed; that his loss on account of it was $5,000; that he made the proof of loss and complied with all the conditions of the policy and that the company has not paid him.

The company comes in and denies that he was the owner of the goods, admits that it issued a $5,000 policy to him, admits that the building burned down in which his stock was located, and denies that he had any such amount of liquors there as he claimed, denies that his loss was $5,000, or anything in excess of $1,000, and then comes in with what in law is known in law as a Third Affirmative Defence. They set up that this policy provided that if the

plaintiff, or policy-holder, was guilty of any false or fraudulent swearing, either before or after the fire, after his loss, that the policy would be void and he could not recover; that the proof of loss which he made was false and fraudulent, that is, that he stated in there that he had a large amount of goods that were destroyed by fire that he did not have, and that he knew that he did not have them, and that he placed a grossly exorbitant value on the goods, which he knew to be exorbitant; that he falsely made these claims in order to deceive and defraud the insurance company. Then they set up another defense that the insurance policy provided that he should exhibit at such reasonable place that the company should require his bills and invoices and inventory of his goods, and that these were requested of him on the 9th or 10th of September or the 9th or 10th of October, I think, and that he refused to do so and therefore should not recover, and for the last affirmative defense they set up the assertion or claim that he destroyed this stock of goods by either burning **[394]** the building and its contents down or causing it to be burned.

The plaintiff then comes back with a reply which you will have with you in which he denies that he made any fraudulent misrepresentation concerning the amount of goods that he had in there or their value, denying that he caused this fire and stating that he did exhibit to the defendant company all the bills and invoices which he had,—all that he had, and that all the bills and invoices had been destroyed by the fire so that he could not comply with the re-

quest in that particular.

There are certain of these issues that places what is called in law the burden of proof upon the plaintiff and there are certain others of them in which the burden of proof is upon the defendant. Before I go into the case any further, I deem it best to advise you on what the law terms the burden of proof. That side of the case which has the burden of proof has to establish its case by a fair preponderance of the evidence, and a fair preponderance of the evidence is known as the greater weight of the evidence, and as evidence does not weigh in the exact way in which we refer to material things about their weight, it is merely a figurative expression, and all the Court can tell you is that that evidence preponderates which is of such a nature or character or amount as to so appeal to your intelligence, reason and experience as to create and induce belief in your minds, and if there is any evidence in opposition to it, that it is still of such strength and character as to induce belief in your minds in spite of what has been brought against it. Now, on the matter of whether the plaintiff owned these **[395]** goods, he will have to maintain that by a fair preponderance of the evidence and also the fact of the issue of the policy not being denied, and that there was a policy issued, it is not necessary to instruct you about these things, but he will have to, by a fair preponderance of the evidence, show the amount of his loss. It is not denied that it is not paid. He will have to show that he complied with the terms in the policy, substantially complied with them, en-

titling him to recover.

The defendant having alleged that the plaintiff caused this fire himself, so far as that affirmative defence is concerned, the burden of proof is upon the defendant and not upon the plaintiff in that regard, and so with that affirmative defence wherein the defendant says that the plaintiff forfeited his policy by making a false and fraudulent proof of loss. The burden is upon the defendant in that regard.

Now, on this question, I will instruct you further, that is, where the burden of proof is upon the plaintiff, if he does not maintain it, if the evidence is evenly balanced, you will decide those issues in favor of the defendant. Then, where I have instructed you in regard to the fraud in the burning of the stock and the building, where I have told you that the burden of proof is upon the defendant, if they do not support that to satisfy you in your minds that he did that, then the burden of proof is upon the defendant, because the weight of the proof would not be enough to sustain that, as the law exacts from the defendant.

You have heard a good deal in this case about the opinions of witnesses regarding the market value. The way to **[396]** arrive at that is if you determine that the market value of the stock covered by this insurance was greater than $5,000, and you find the other issues for the plaintiff, it would not be necessary for you to determine exactly how much it was, because the plaintiff cannot recover more than $5,000. You would not have to figure exactly how much, if you concluded the stock was worth $5,000,

and find the other issues for the plaintiff; but if you could not find the other issues for the plaintiff, and in figuring it up you find it was less than $5,000, it would be necessary for you to determine what the market value of that merchandise,—what the fair market value of it was at the time and place where it was burned. There has been a great deal of evidence admitted in the case about the cost in Kentucky, Portland, San Francisco, Seattle and other cities, and evidence concerning freight rates, and evidence concerning liquors and the sale for them at retail, and other matters of that kind, but they are only sidelights, evidence that has been admitted for your consideration in throwing a light on this question of probably what the value, the market value of this liquor and these cigars were at Long Beach at the time of this fire.

The Court instructs you that the purpose of the policy is in case of an honest loss enabling the policy-holder to make himself whole, that is, to replace the property he has lost. You will understand that the retail value at which liquors sell by the glass,—you will not resort to that because if he had a large stock of goods, he did not have to buy it that way, he did not have to make himself whole by buying back at retail what he lost by the fire. But the **[397]** law presumes that a man will be able to make himself whole in all probability by buying back at the fair market value, and that is known and sometimes described as the value which one, having a piece of property, was willing to sell at but did not have to sell, and another man,—found a man willing to buy

but who did not have to buy, the price at which these two men would arrive at would be the fair market value. Another way of arriving at that would be the price that men would be compelled to pay for property where they go into the open market to buy.

Regarding the charge in one of these affirmative defences that the plaintiff falsely and fraudulently misrepresented in his proof of loss concerning the amount of his stock destroyed and the value of it, the Court deems it his duty to instruct you, there is one thing you will consider as applying to his expression concerning values that is not applicable to his proof of loss, concerning the amount. You will understand that if he was honestly mistaken that he would not forfeit his right under the policy, that his misstatements must have been false or fraudulent, and to be false it is necessary that he knew they were false when he made them, wilfully, intelligently, knowingly, misrepresented. The mere fact that he was mistaken or the mere fact that he overvalued the goods, if it was an honest opinion regarding the value of them, that would not defeat him. On these questions of value, you will understand it is a matter of opinion. It is very difficult to convict a man of perjury on his opinion concerning the value of anything. Men so vary in their opinions in these matters that it would be dangerous, if there was any reasonable ground to sustain **[398]** the plaintiff's belief regarding the value, to reject that and conclude, simply because you find that the goods were not worth as much as he said they were, that

therefore he was necessarily making a fraudulent representation.

There has been a number of written instructions requested, and if I to some extent repeat what I have already told you, you should not think that I am trying to impress upon you certain points in the case to the exclusion of others.

"It is provided by the statute of the State of Washington (sec. 105, Laws of 1911, p. 243), as follows: 'Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected.' Under this provision of the law I charge you that the defendant insurance company was presumed to know at the time it issued this policy of insurance in the sum of $5,000 covering the property described in said policy and situated in the buildings described in said policy, the value of said property. If it now claims otherwise the burden of proof rests with the defendant to so show by a fair preponderance of the evidence."

"Whenever fraudulent acts are either done or attempted the parties guilty thereof usually conceal their acts, and the direct and positive proofs thereof rest wholly in the **[399]** breasts of the guilty parties. In such cases, therefore, the usual and ordi-

nary proofs by which such frauds, if fraudulent acts be attempted or done, are established, are the facts and circumstances surrounding the transactions. Such facts and circumstances, in order to be sufficient to establish the fraudulent act or interest in issue in any given case, must be such as will convince the mind of an ordinarily prudent person that the party charged is guilty of such fraud, and such as is not susceptible of any natural and reasonable explanation consistent with the honesty and integrity of such person in respect to the matters in issue."

"The jury is instructed that fraud may be proven by circumstantial evidence as well as positive proof. When fraud is charged, as is done in this case, express proof is not required. It may be inferred by strong presumptive circumstances." I think the Court instructed you when you were being empaneled that facts may be established either by direct or circumstantial evidence, and in order to arrive at a finding on circumstantial evidence, it is evidence of the facts standing around the matter which you are investigating or the question which you are attempting to settle. It is not evidence of an eye-witness where a man can tell you, 'I saw this,' and if you believe it that settles it, but as I told you, it is the circumstances surrounding such a transaction, where the finding has to be based entirely on circumstantial evidence, those circumstances must be proven by a fair preponderance of the evidence. Any circumstances that are argued, to tend to prove fraud on the part of the plaintiff, that are not proven by a fair preponderance of the evidence, you will reject.

These circumstances [400] must not only be proven as true, but they must be consistent with each other. They must be consistent with the theory that the plaintiff was guilty of fraud, and they must be inconsistent with any reasonable theory that he was innocent of fraud. If the circumstances do not measure up to that standard, then they are not sufficient on which to make a finding against the plaintiff.

"If the plaintiff has been guilty of fraudulent or false swearing he cannot recover in this action even though the value of the property destroyed by fire is more than the amount of the policy. If you should find a verdict in favor of the plaintiff the amount should be the actual market value of the property at the time of its destruction by fire, and no more."

You will understand that I am not changing the instruction which I gave you concerning the amount of his recovery. If you should find the other issues, that is, that he had not been guilty of fraud, then you should find that the value of the property was in excess of $5,000, you need not determine the exact amount, but if he was guilty of fraud in these matters as defined to you, even then, if you should find the value in excess of $5,000, he could not recover because of his fraud.

"One of the defenses urged in this case is that the policy is void because the plaintiff was guilty of false swearing in making his proof of loss. The precise point urged is that he falsely and fraudulently, and for the purpose of defrauding the defendant Insurance Company, overestimated the amount and value of the property destroyed by fire. Now on this phase

of the case I charge you that before you can [401] find for the defendant upon this issue you must find that the plaintiff, for the purpose of defrauding the defendant Insurance Company, wilfully and knowingly made a false affidavit as to the amount or value of the goods destroyed by fire. Even though you should find from the evidence that the plaintiff overestimated the value of the goods so destroyed by fire, that fact standing alone would not be sufficient to void the policy; but you must further find that the statement made in the affidavit as to the value of the goods was wilfully made for the purpose of deceiving or defrauding the defendant or its agents. The law does not convict anyone of fraud or false swearing simply because they place a higher value on their holdings than they are actually worth, unless as I have said, such valuation is placed thereon for the purpose of fraud or deception. A false statement, to defeat recovery in such a case as this, must be false to the knowledge of the assured and made for the purpose of deceiving or defrauding the Insurance Company, or its agent. In considering this phase of the case, you should take into consideration all the facts and circumstances developed on the trial and disclosed by the evidence. The burden of proof as to this defense is on the defendant, and unless it has satisfied you by a fair preponderance of all the testimony that the stock of goods so claimed to have been destroyed by fire was overstated or overvalued, and that such excess claim or overvaluation was wilfully and knowingly made for the purpose of defrauding the defendant Insurance Company, then your find-

ing as to this defense should be in favor of the plaintiff and against the defendant."

"Another defense set up in the Answer of the defendant [402] insurance company is that the plaintiff refused to produce to defendant for examination all bills for purchases of stock, inventories, invoices or record of sales made, vouchers or certified copies thereof, so as to enable the defendant to ascertain the extent of plaintiff's alleged loss. It was the duty of the plaintiff to submit for examination to defendant, or its authorized agent, all books of account, bills, invoices and other vouchers, or certified copies thereof if the originals are lost, at such reasonable place as might be designated by the defendant or its agent. In reply to this affirmative defense urged by defendant, plaintiff alleges that all books of account, bills, invoices and other such papers were destroyed by the fire which destroyed his property, and that it was impossible for him to produce the same. Now, if you believe from the evidence that at the time demand was made upon the plaintiff for the production of such original documents that the same were destroyed by fire and the plaintiff was unable to furnish the same, then, and in that event, this action cannot be defeated by reason of his failure to produce such documents, if it was beyond his power so to do."

This policy required him to produce at such reasonable place as the defendant requested, these documents, and if the originals were destroyed, certified copies. If the defendant company did not require him to produce these at a designated place,

then his failure to produce certified copies would not defeat his recovery. In this connection, I will call your attention to the letters of September 10th and October 9th in which the defendant pleads it demanded these things. As the Court reads those letters, they do not **[403]** designate any place at which he is to produce them. If there is nothing more in the case than the request in those letters, then his failure to produce copies would not defeat his action, because they did not ask him to produce them at any particular place in those letters.

It has been argued to you that intoxicating liquor is a property that is recognized and protected by the law and is conceded by defendant's counsel in his argument to you. The question to be determined by you is whether this man had an honest loss and the amount of it. You are not to allow any prejudice regarding the character of the goods to prejudice you, either in finding for the plaintiff generally or the amount you award him for damages. You will be controlled by the evidence concerning the market value of the goods which he actually lost which were actually covered by this policy.

There has been some argument about some items covered in his proof of loss that were not covered in the policy. The policy showed that the man was engaged in the saloon business and selling liquors and cigars, and soda waters and other matters that went to make up his saloon business. The merchandise which he was selling were the things that were insured. If he included towels, glasses and matters that he used in the saloon business, if it was so plain

on the face of it that they were not covered by the policy that he could not deceive the insurance company, then the Court instructs you there would be no fraud on his part simply by including items in there that the defendant insurance company would be presumed to know of by going over the form of the policy they used and they could learn that **[404]** these things were not covered by the policy itself because it was confined to liouors and such things as saloon-keepers would sell.

It is the duty of the Court to instruct you as to another important function you are to perform and that is concerning the credibility of the witnesses. As I have instructed you in other cases, you are the sole and exclusive judges of every fact in the case and the weight of the evidence and the credibility of the witnesses. In passing upon these things, it is your right and duty to resort to all of the rules and tests that you have found in your experience as to enable you to determine where the truth lies in human transactions. The law says you should take into consideration the question of the manner and demeanor of the witnesses who appear and testify before you, whether they testify just as you would expect men to testify who are telling you the truth as they saw it and knew it, or whether they were reluctant, hesitating, evasive, equivocated so as to keep back some particular part of their testimony that had to be dragged out of them by repeated questions. On the other hand, you will take into consideration whether a witness has been too willing or too free in testifying, running on, answering

questions that were not asked of him, what the law calls swift witnesses, taking into consideration the place in which the witness was placed, and his experience as would enable him to give you the exact facts of the situation or the incident about which he undertook to tell you. He might not be so situated as to know the exact facts, and his experience where he undertakes to give you information in regard to value, as some of the witnesses have in **[405]** this case, his experience may not be such as to give great value to his opinion as it might to other witnesses who had greater experience. You will also take into consideration the interest any witness may have in the case as shown, either by the manner in which he testifies or by his relation to the case. You understand in matters of opinion that a man's interest in a case—witnesses have testified concerning their opinion as to value, and other witnesses have testified as to their opinion as to a man's reputation. A man's opinion is so much the creature of his will that you are authorized to and should take that into consideration in measuring the value of his opinions.

If you believe any witness has wilfully testified falsely as to any material matter in the case, you may disregard his evidence entirely, unless it is corroborated by other credible testimony in the case. It is not everything in the case that is material. Those points upon which a case turns are material, but many things are asked about in a lawsuit that are immaterial. If a man does try to keep something back from you or color or distort a matter that

is immaterial, you would not be authorized to reject his testimony. The plaintiff having testified in his own behalf you will apply to his testimony the same rules and tests you would to the other witnesses including his interest in the result of the case.

Two forms of verdict will be submitted to you, one finding for the defendant generally, and one for the plaintiff with a blank in which, if you find for the plaintiff, you will insert the amount at which you fix his damages. When you have agreed upon your verdict, you will notify the Bailiff **[406]** of that fact and return with your verdict into court.

Jury retires.

[Exceptions to Instructions Given and Refused.]

Mr. COLE.—I wish to make exception in regard to the first instructions given in regard to the presumption of knowledge and the one in regard to the invoices, with regard to the plaintiff producing them in a reasonable place.

Exception allowed.

Mr. COLE.—The defendant excepts to the instruction that failure to produce certified copies of the bills or invoices would not be a defense on the ground and for the reason that no reasonable place was specified in the demand.

Exception allowed.

Mr. COLE.—Defendant also excepts to the following instruction given by the Court: "It is provided by the statute of the State of Washington (sec. 105, Laws of 1911, p. 243), as follows: 'Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and

every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein [407] owned by him, is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected.' Under this provision of the law I charge you that the defendant insurance company was presumed to know at the time it issued this policy of insurance in the sum of $5,000 covering the property described in said policy and situated in the buildings described in said policy, the value of said property. If it now claims otherwise the burden of proof rests with the defendant to so show by a fair preponderance of the evidence."

Exception allowed.

Mr. COLE.—I think there was some of our requested instructions not given.

The COURT.—Yes, I refused Numbers 3, 4, 6 and 10.

Mr. COLE.—We except to the refusal of the Court to give defendant's requested instructions Numbers 3, 4, 6 and 10.

Exception allowed.

Mr. COLE.—The defendant excepts to the refusal of the Court to give defendant's requested instruction Number 11 reading as follows: The jury is instructed that there is no evidence as to the market value of the case goods and therefore they must be eliminated from the case.

Exception allowed.

The COURT.—It seems to me I did not give one instruction that I intended to give and that was in regard to Mr. Kayler. If you want me to, I will recall the jury and instruct them on that. I switched off from your copy, Mr. Cole, and did not go back to it. If you insist, I will give it. **[408]**

Mr. COLE.—Yes, I would like to have them instructed on that point.

Jury recalled by Court.

[Additional Instructions.]

The COURT.—Gentlemen of the jury: There were a number of instructions on my desk—too many papers, and I overlooked one and I have called you back to give it to you. (Reading:) "If you find from the evidence that Henry Kayler, who was the defendant's agent in issuing the policy, assisted the plaintiff or acted on his behalf in making out or submitting the proof of loss, that would be no defense to the plaintiff, as said Henry Kayler was not authorized or empowered by the defendant to make out, or assit the plaintiff in making out his proof of loss."

"You are further instructed that the said Henry Kayler in assisting the plaintiff in making out and submitting his proof of loss to the defendant, acted as agent for the plaintiff and did not represent the defendant in that connection in any manner whatsoever."

You understand the fact that Henry Kayler was the man that did make out the proof of loss, that was a circumstance that you would be authorized to consider in determining whether or not the plaintiff is guilty of fraud, whether he would be likely to go and

pick out an agent of the company to prepare a proof of loss.

Mr. BRUNBAUGH.—Exception.

Exception allowed. [409]

WHEREUPON, the jury returned to consider of their verdict, in charge of an officer duly sworn as by law provided.

WHEREUPON, after deliberation said jury returned to the Court a verdict in favor of the plaintiff and against the defendant for the sum of five thousand dollars.

WHEREUPON, on the 30th day of October, 1913, a judgment in favor of the plaintiff and against the defendant on said verdict was entered by the Court in the sum of five thousand dollars, with interest thereon at the rate of six per cent per annum from the 6th day of December, 1912, together with his costs and disbursements thereafter taxed at $210.50.

It is further certified that the time of the defendant in which to tender its Bill of Exceptions in said cause was from time to time extended to and including the 10th day of January, 1914.

WHEREUPON, on the 15th day of November, 1913, defendant files its motion for a new trial.

WHEREUPON, on the first day of December, 1913, said motion for a new trial was overruled, to which order overruling the motion for a new trial defendant excepted, and the exception was allowed.

[Order Settling, Certifying and Allowing Bill of Exceptions.]

WHEREUPON, the Court being willing to preserve the record in this cause in order that its rulings

may be reviewed for error, if any there be, certifies that the foregoing Bill of Exceptions contains all of the evidence offered or admitted upon the trial of said cause, together with the rulings of the Court thereon and the rulings of the Court in admitting or excluding testimony at said trial; together with the instructions [410] given by the Court, the instructions requested by the defendant and refused, and the exceptions taken to the rulings of the Court and to any instructions given and the exceptions allowed thereon.

It is further certified that there is attached to and made a part of this Bill of Exceptions all of the exhibits offered or admitted at said cause, which are hereto attached, made a part hereof and marked exhibits.

It is further certified that the foregoing Bill of Exceptions contains all proceedings occurring in the trial of the above-entitled cause, and all of the evidence introduced in said cause, and said Bill of Exceptions is hereby made a part of the record herein.

WHEREUPON this Bill of Exceptions is now here settled, certified, signed and allowed this 22d day of January, 1914.

EDWARD E. CUSHMAN,
Judge of Said Court.

The within Bill of Exceptions tendered and filed this 8th day of January, 1914.

FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy. [411]

[Plaintiff's Exhibit No. 2 (Telegram).]

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Central Nat. Fire Ins. Co.

Form 168.

THE WESTERN UNION TELEGRAPH COMPANY.

Incorporated.

25,000 Offices in America. Cable Service to all the World.

This Company transmits and Delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delays in transmission or delivery of Unrepeated Messages, beyond the amount of tolls paid thereon, nor in any case beyond the sum of Fifty Dollars, at which, unless otherwise stated below, this message has been valued by the sender thereof, nor in any case where the claim is not pre*stn*ed in writing within sixty days after the message is filed with the Company for transmission.

This is an Unrepeated Message, and is delivered by request of the sender, under the conditions named above.

BELVIDERE BROOKS,
General Manager.

THEO. N. VAIL,
President.

RECEIVED at 76 Third St., Cor. Oak, Portland, Ore. Always Open.

CO. BY. 22 Collect. 1 Extra.

Longbeach Wn June 27. 12.

Davenport Dooley & Co,
Portland Ogn.,

Risk covered by policy 590757 burned this morning prosecuting attorney on spot investigating Total Loss.

1:11 pm.

P. KAYLER, Agent.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 21, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [412]

Defendant's Exhibit No. 3 [Inventory].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Cent. Nat. Fire Ins. Co.

INVENTORY ATTACHED TO AND FORMING PART OF BULK LIQUORS ON HAND—PROOF OF LOSS—UNBROKEN PACKAGES.

	Qty.	Item	Year	Amount
bbl. tapped gallon old.	5 bbls.	Old Crow Jan. 2, 1906		1000.00
	4 bbls.	Cedar Brook McBrayer	1903	800.00
ot tapped	3 —	Green River	1902	750.00
ntapped	3 —	Penryck	1904	400.00
bbls. not apped	1 —	Old Crow	1899	350.00
gallons rawn	1 —	Fox Mountain	1896	400.00
ot tapped	2 —	A. G. McBrayer single stamp		300.00
bbl. not apped	1 —	Wicklow		125.00
	1 —	California Port wine		75.00
	1½ —	Imported Port wine 16 gall.		75.00
	1½ —	California Brandy 16 gall.		40.00
	1½ —	Rum Hudson Bay		50.00
	4 gall.	Gin Box jug		9.00
	5 Cases	Whiskey flasks		20.00

2 Bbls.	Clark Bros. whiskey	214.35
1000	Attencion Cigars	35.00
500	Alhambra —	17.50
5 bbls.	Bottled beer	47.50
900	Y. & B. Cigars	81.00
800	El Rayo —	72.00
500	Gato —	45.00
1600	Optimos —	144.00
500	Van Dyck —	45.00
100	Carabana —	9.00
100	Loveras —	9.00
200	Carletons —	12.00
200	Eschelles	12.00
800	Manilla —	40.00
7 Boxes	Egyptian Cigarettes	7.00
1 —	— Luxury	2.50
1 —	Pall Mall Imported	2.50
		5189.35

[413]

5 Cases	Joe Gideon Whiskey		62.50
15 —	Joel B. Frazier — and 8 bottles in show case		180.00
22 —	Roxbury Rye —	7 — — — —	200.00
4 —	Guggenheimer —	5 — — — —	40.00
4 —	Old Crow Bourbon —	9 — — — —	50.00
4 —	Hermitage — —	6 — — — —	50.00
4 —	Gibson Rye —	3 — — — —	40.00
2 —	Pebble Ford	8 — — — —	25.00
2 —	McBrayer	9 — — — —	27.00
1 —	Cyrus Noble	4 — — — —	14.00
3 —	Atherton	9 — — — —	40.00
4 —	W. H. Lacey		40.00
2 —	Yellowstone		25.00
2 —	Holland Gin Imp.	14 — — — —	45.00
2 —	Gordon — —	9 — — — —	30.00
2 —	Martelle Brandy —	6 — — — —	40.00

2 — J. Hennessy — — 9 — — — — 36.00
4 — Sazarae (?) — — 3 — — — — 50.00
2 — Scotch Whiskey — 10 — — — — 30.00
1 — Old Curio — — 20.00
4 — Sloe Gin 40.00
1 — Jamaica Rum — 14.00
2 — Canadian Club
whiskey 7 — — — — 17.50
1 — Mountain Dew Scotch
whiskey 14.00
3? — Italian Vermouth 24.00
1 — French — 9.00
2 — Maraschino Cherries 12.00
2 — Rock & Rye 14.00
2 — Pineapple Rock & Rye 20.00

1166.50

[414]

1 Case Benedictine Imp.......................... 35.00
6 bottles Creme de Menthe Imp..................... 12.00
6 — Creme de Co*cao* — 12.00
1 — Picon — 2.00
2 — Boonekamp bitters 2.00
2 Cases Claret wine 9.00
2 — Muscat — 9.00
2 — Angelica — 9.00
2 — Madeira — 9.00
2 — Sherry — 9.00
2 — Tokay — 9.00
4 — Cresta Blanca—Margaux 36.00
2 — Sparkling Burgundy pts. 26.00
2 — — — qts. 26.00
3 — Mont Rouge—Sauterne — 30.00
2 — Mont Rouge—Burgundy — 24.00
6 Doz. Beer Glasses 12.00
2 — Water — 2.75
5 — Whiskey — 8.00

2	Sets	Measures Copper	12.00
2	—	Funnels —	12.00
8	Doz.	Bar & Glass Towels	24.00
8		Decanters	8.00
25	gross	Corks all sizes	4.00
			353.75

[415]

4	Doz.	1 gal. Demijohns	20.00
5	—	½ — —	15.00
2	—	Champagne glasses	4.00
2	—	Port wine —	3.00
2	—	Brandy —	3.00
2	—	Cocktail —	3.00
2	—	Vermouth —	3.00
2	—	Benedictine —	3.00
3	Cases	Sauterne Van Schuyver	13.50
2	—	Old Tom Gin J. W. Nicholson Imp.	22.50
2	—	Lash Bitters	16.00
1	—	Ginger Brandy	8.00
2	—	Virginia Dare Wine	12.00
1	—	Lyons Cocktails	12.00
1	—	Mumms Champagne	37.00
1	Can	Alcohol 4¾ gall.	12.00
2	Cases	Damiana Bitters	16.00
1	—	Stout Imported	14.00
1	Drum	Bass's Ale —	16.00
2	Bbls.	Budweiser beer, qts.	25.00
28	bottles	Hock wine	11.00
1	qt.	Jamaica Ginger	1.50
1	—	Essence Peppermint	1.50
2	Cases	White Rock Mineral Water	17.00
1	—	Bartlett — —	8.50
1	bbl.	Soda Water	8.50
1	—	Ginger Ale	8.50
5	—	Weinhard bottled beer	45.00
2	Cases	Grape Juice, large size	9.00
			320.50

[416]

1 bbl. Mellwood Whiskey about 15 gall.	....	$ 37.50
1 keg. "	3 —	7.50
1 keg Old Crow	2½—	6.25
20 bottles various liquors on back bar	....	25.00
126 — in show cases aver. 1.25 p. bot.	....	157.50
6 broken boxes cigars, about 300 cigars, aver. 75.00 per M.	....	22.50
Cordials, mineral waters, soda waters, beer and ales in back bar	....	30.00
20 gall. Blackberry brandy	....	50.00
10 — Dry Sherry at 1.25 gal.	....	12.50
		348.75

Recapitulation:

Sheet 1	5189.35
— 2	1166.50
— 3	353.75
— 4	320.50
— 5	348.75
	7378.85

[417]

For further information in regard to value of the different whisky would refer you to The Internal Revenue officers at Tacoma, also Mr. Locke of the firm of Greenbaum Bros., Louisville, Kentucky, residing at 1130 Hawthorne Ave, Portland, Julius Friedman, of Blumaur & Hoch, & Mr. Adams of Fleckenstein & Son, Frank Botefuhr and Julius Wellman of Brown Foreman & Co. As to cigars I bought of Mason Ehrman & Co, Gunst & Co, Hart Cigar Co, Taylor of Astoria representing Sch'ba*ck*er & Co. If necessary will furnish sworn affidavits from above people & other prominent persons who are familiar with my stock as I wish you to under-

stand that I desire the fullest investigation. That I have nothing to conceal & can substantiate everything that is stated in above inventory

Remaining

Yours respecty,

WM. BLACK.

* * * * * * * * *

As per inventory Attached Thereto.

(Endorsed):

Claim No. ....

PROOF OF LOSS.

Central National Insurance Co.

Of

Chicago Ill.

Assured—Wm. Black.

Loss payable to Wm. Black.

Locality—Long Beach, Wash.

Issued at Long Beach, Wash., Agency. **[418]**

Policy No. 590757. Amount, $5000.

Total Am't of Insurance, $5000.

Total Amount of Loss, $7378.85.

Am't Loss under this Policy, $5000.00.

Amount Awarded, ——$.

Date of Fire June 27, 1912.

Proofs Received at Gen'l Office........ 190....

Date of payment........ 190.....

Adjuster........

No. of Policy 590757. Amt. of Policy $5000.00.

PROOF OF LOSS

To the

CENTRAL NATIONAL FIRE INSURANCE COMPANY

Of Chicago, Ill.

By Your Policy of Insurance Numbered 590757 issued at your Agency at Long Beach, Wash commencing at 12 o'clock noon, on the 17th day of June, 1912, and terminating at 12 o'clock noon, on the 17th day of June 1913 you insured Wm. Black against loss and damage by fire to the amount of Five Thousand Dollars, according to the terms and conditions of said Policy, the written portion thereof together with an exact copy of all endorsements assignments and transfers, being as follows, viz:

MERCHANDISE FORM.

$5000.00 On his stock of merchandise, consisting principally of wines, liquors soda & mineral waters beer & cigars and all other goods, wares and merchandise not more hazardous kept for sale by assured, while contained in two story shingle roofed frame building and adjoining and communicating additions thereto, while occupied as saloon and situate Lot 6 Blk 6 Tinkers north [419] addition to Long Beach Pacific County Wash

$ nil On furniture and fixtures while contained in said building.

$ nil Other concurrent insurance permitted.

POWDER AND KEROSENE.—Permission granted to keep for sale not to exceed fifty pounds of gunpowder and five barrels of kerosene oil, the latter to be of not less than the United States standard of

110 degrees, neither to be handled or sold by artificial light.

ELECTRIC LIGHTS.—Permission for electric lights, it being agreed that all wires shall be doubly coated with approved insulating material, and protected where they enter buildings, by porcelain or hard rubber insulators, and shall also have fusible cut-offs.

LIGHTNING CLAUSE.—This policy shall cover any direct loss or damage caused by lightning, (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm,) not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy: PROVIDED, however, if there shall be any other insurance on said property this company shall be liable only pro-rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not; and provided further that, if dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this company shall not be liable for any loss or damage to such property resulting from any electrical injury or disturbance, whether from artificial or natural causes, unless fire ensues, and then for the loss by fire only. Attached to and forming a part of Policy No. 590757 of the Central National Fire Insurance Co., of Chicago, Illinois.

HENRY KAYLER, Agent. [420]

Loss, if any, payable to WM. BLACK.

The total insurance on said property, or any part

thereof, at the time of the fire, including this policy, was Five Thousand DOLLARS.

A fire occurred on the 27th day of June, A. D. 1912, at about the hour of 1:30 o'clock A. M., by which the property insured was destroyed, or damaged, as herein set forth, and which originated as follows: Cause unknown.

THE CASH VALUE of each specified subject at the time of the FIRE, and the actual LOSS and DAMAGE thereon by said fire as ascertained by appraisal, or by mutual agreement, and the whole amount of Insurance thereon were as follows:

	Property.	Sound Value.	Total Loss.	Total Insurance.	Total Claim Under Insurance.	Insurance by this Company.	Claimed of this Insurance Co.
1st.	Item of Policy	8000.	8000.	5000.	5000.	5000.00	5000.—
2d	" "						
3d	" "						
4th	" "						
5th	" "						
6th	" "						
7th	" "						
8th	" "						
9th	" "						
	Total						

And the insured claim of the above-named COMPANY, by reason of said loss, damage, and Policy of Insurance, the sum of Five Thousand Dollars, in full of their proportion of said loss.

The property insured belonged exclusively to WM. BLACK and no other person or persons had any interest therein.

If the loss is on building, state whether Real Estate is owned in fee simple or held on lease.

Fee simple. [421]

State the nature and amount of incumbrance at the time of the fire ......none.

The total value of property saved is $...... none as per statement attached hereto, marked Schedule

The building insured, or containing said property, was occupied in its several parts by the parties hereinafter named and for the following purposes, to-wit: ...... Wm. Black, saloon and for no other purposes whatever.

The said fire did not originate by any act, design, or procurement on part of assured, nor on the part of anyone having any interest in the property insured, or in the said Policy of Insurance; nor in consequence of any fraud or evil practice done or suffered by said assured, that nothing has been done by or with the privity or consent of assured to violate the conditions of the Policy, or to render it void; and then no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and in the possession of the said insured at the time of the said fire; that no property saved has been in any manner concealed, and that no attempt to deceive the said Company as to the extent of said loss or otherwise, has in any manner been made. Any other information that may be required will be furnished on call, and considered a portion of these proofs.

It is furthermore understood and agreed that all bills, invoices, schedules and statements made by the assured, and attached to this Proof of Loss, are to be oncorporated into this proof, and are hereby duly sworn to and made a part thereof.

The furnishing of this blank to assured, or making up of proofs by Adjuster for Company, is not to

be considered as a waiver of any rights of the Company.

Witness my hand at Long Beach, Wash., this 22d day of August, 1912.

WILLIAM BLACK. [422]

Personally appeared ...... Wm. Black, signer of the foregoing Statement who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of, before me this 22nd day of August, 1912.

[Notarial Seal] HENRY KAYLER,

Notary Public in & for the State of Washington, Residing at Long Beach, Wash.

NAME OF COMPANY—CENTRAL NATIONAL No. of Policy 590757.

Loss on 1st Item.	Loss on 2nd Item.	Loss on 3rd Item.	Loss on 4th Item.	Loss on 5th Item.	Loss on 6th Item.	Loss on 7th Item.	Loss on 8th Item.	Loss on 9th Item.	Total.
$.......	$.......	$.......	$.......	$.......	$.......	$.......	$.......	$.......	
First Item.	Second Item.	Third Item.	Fourth Item.	Fifth Item.	Sixth Item.	Seventh Item.	Eighth. Item.	Ninth Item.	
Insures. 5000.	Insures.	Insures.	Insures.	Insures.	Insures.	Insures.	Insures.	Insures.	Insurance by each Company ....
Pays.	Pays.	Pays.	Pays.	Pays.	Pays.	Pays.	Pays.	Pays.	Loss under each Company. ....

As per inventory attached hereto.

"Filed in the U. S. District Court, Western District of Washington, Southern Division. Oct. 21, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [423]

Plaintiff's Exhibit No. 4 [Bill of Lading].

Case No. 1297. United States District Court, Western District of Washington, Wm. Black vs. Central Nat. Fire Ins. Co.

"STRAIGHT BILL OF LADING—ORIGINAL—
NOT NEGOTIABLE.

Received, subject to the classification and tariffs in effect on the date of issue of this Original
Bill of Lading.

FROM CLARKE BROS. & CO.
Distillers.

* * * * * * * * *

at Peoria, Ill. Apl 30 12 Shippers No. 12075.

) O Railroad Company.

P. A. Hill & Co.

* * * * * * * * *

Consigned to Wm. Black

Destination Long Beach, State of Washington,
County of ......

Route No Pac

No. Packages.	Description of Articles and Special Marks.	Weight Subject to Correction.	Class or Rate.
2	Brl Wky	838	260
	751447–8		

W. A. BAITTU. (?)

'This is to certify that the above articles in this shipment are properly described, packed and marked, and that all necessary labels have been attached to packages, as required by General Notice.'

....R. R.

CLARKE BROS. & CO.

By SINCLAIR." [424]

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington. Southern Division. Oct. 21, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [425]

Defendant's Exhibit "A-8" [Inventory].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Cent. Nat. Fire Ins. Co.

COPY.

5 bbls.	Old Crow Jan. 2, 1906		1000.00
4 bbls.	Cedar Brook McBrayer	1903	800.00
3 —	Green River	1902	750.00
3 —	Penryck	1904	400.00
1 —	Old Crowe	1899	350.00
1 —	Fox Mountain	1896	400.00
2 —	McBrayer single stamp		300.00
1 —	Wicklow		125.00
1 —	California Port wine		75.00
1½ bbl.	Port wine imp. 16 gall		75.00
1½ —	California Brandy		40.00
1½ —	Rum		50.00
4 gall.	Gin Box jug		9.00
5 Cases	Whiskey flasks		20.00
2 Bbls.	Clark Bros. whiskey		214.35
1000	Attencion Cigars		35.00
500	Atherton		17.50
5 bbls.	Bottled beer		47.50
900	Y. & B. Cigars		81.00
800	El Rayo		72.00
500	Gato		45.00
1600	Optimos		144.00
500	Van Dyck		45.00
100	Carabana		9.00
100	Loveras		9.00
200	Carlebon		12.00
200	Eschelles		12.00

800	Manillas	40.00
7 Boxes	Egyptian Cigarettes	7.00
1 —	— Luxury	2.50
1 —	— Pall Mall	2.50
		5189.35

[426]

COPY.

5	Cases	Joe Gideon Whiskey 12.50 per case	62.50
15	—	Joel B. Frazier — 12	187.00
22	—	Roxbury Rye —	200.00
4	—	Guggenheimer —	40.00
4	—	Old Crow Bourbon —	50.00
4	—	Hermitage — —	50.00
4	—	Gibson Rye —	40.00
2	—	Pebble Ford	25.00
2	—	McBrayer	29.00
1	—	Cyrus Noble	14.00
3	—	Atherton	40.00
4	—	W. H. Lacey	40.00
2	—	Yellowstone	25.00
2	—	Holland Gin Imp.	45.00
2	—	Gordon — Imp.	30.00
2	—	Martelle Brandy	40.00
2	—	Hennessy	36.00
2	—	Sazarae (?)	50.00
2	—	Scotch Whiskey	30.00
1	—	Curio —	20.00
4	—	Sloe Gin	40.00
1	—	Jamaica Rum	14.00
2	—	Canadian Club	17.50
1	—	Mountain Dew Scotch Whiskey	14.00
3?	—	Italian Vermouth	24.00
1	—	French —	9.00
2	—	Maraschino Cherries	12.00
2	—	Rock & Rye	14.00
2	—	Pineapple Rock & Rye	20.00
			1166.50

[427]

COPY.

1	Case	Benedictine Imp.	35.00
2	—	Claret wine	9.00
2	—	Muscat —	9.00
2	—	Angelica —	9.00
2	—	Madeira —	9.00
2	—	Sherry —	9.00
2	—	Tokay —	9.00
4	—	Margaux Cresta Blanca	36.00
2	—	Sparkling Burgundy pts.	26.00
2	—	— — qts.	26.00
3	—	Mont Rouge Spark. Sauterne	30.00
2	—	— — —	24.00
6	bottles	Creme de Menthe Imp.	12.00
6	—	Creme de Cocoa —	12.00
1	—	Picon	2.00
2	—	Boonekamp bitters	2.00
6	Doz.	Beer Glasses	12.00
2	—	Water —	2.75
5	—	Whiskey —	8.00
2	Sets	Measures Copper	12.00
8	Doz.	Bar & Glass Towels	24.00
8		Decanters	8.00
25	gross	Corks all sizes	4.00
			353.75

[428]

COPY.

4	Doz.	1 gal. Demijohns	20.00
5	—	½ — —	15.00
2	—	Champagne glasses	4.00
2	—	Port wine —	3.00
2	—	Brandy —	3.00
2	—	Cocktail	3.00
2	—	Vermouth —	3.00
2	—	Benedictine —	3.00
3	Cases	Sauterne Van Schuyver	13.50

2	—	Old Tom Gin Nicholson Imp.	22.50
2	—	Lash Bitters	16.00
1	—	Ginger Brandy	8.00
2	—	Virginia Dare Wine	12.00
1	—	Lyons Cocktails	12.00
1	—	Mumms Extra Dry Champagne	37.00
1	Can	Alcohol 4¾ gall.	12.00
2	Cases	Damiana Bitters	16.00
1	—	Stout Imported	14.00
1	Drum	Bass Ale	16.00
2	Bbls.	Budweiser beer	25.00
28	bottles	Hock	11.00
1	qt.	Jamaica Ginger	1.50
1	—	Essence Peppermint	1.50
2	Cases	White Rock Mineral Water	17.00
1	—	Bartlett — —	8.50
1	bbl.	Soda Water	8.50
1	—	Ginger Ale	8.50
5	—	Weinhard Beer	45.00
2	Cases	Grape Juice, large size	9.00
			320.50

[429]

BULK LIQUORS BROKEN. COPY.

1 bbl. Mellwood Whiskey about 15 gall. left	37.50
1 keg " 3 — —	7.50
1 keg Old Crow 2½ — —	6.25
20 bottles various liquors on back bar	25.00
126 — in show cases average 1.25 per bot.	157.50
6 broken boxes cigars, about 300 cigars, aver. 75.00 per M.	22.50
Cordials, mineral waters, and soda waters, beer, in back bar	30.00
20 gall. Blackberry brandy	50.00
10 — Dry Sherry at 1.25 gal.	12.50
	348.75

590757
Central National **[430]**

WM. BLACK FIXTURES contained in saloon building, Lot 6, Blk. 6, Tinkers N. Add. Long Beach, Wash., June 27th, 1912.

Item	Amount
Bar, back bar & work board	400.00
Glassware	100.00
40 chairs	60.00
Cash register	225.00
Safe	100.00
Pictures	150.00
3 tables	25.00
Desk & office furniture including mission chairs	50.00
Linoleum	75.00
Clock	25.00
Racks	10.00
Lighting plant & piping	100.00
Pump & piping and fixtures	100.00
Faucets, brass	25.00
Show cases	100.00
Stove & piping	15.00
Brass rail	22.00
Patents corkscrew	12.00
" lemon squeezer	8.00
Copper measure & funnels	25.00
Check stamping machine	10.00
Silverware, such as spoons & shakers	25.00
Ornaments	10.00
Elk horns 1722	50.00
Tools	58.00
Books, various—Enc. Brit., Chas. Dickens	50.00
Hydrometer & tester	12.00

Item		Amount
Portieres		10.00
Curtains		2.50
Clothing, i. e., bar coats & vests & towels		50.00
Step ladder		5.00
Patent window cleaners, mops, brooms, pails.		5.00
Umbrella, gold headed		5.00
Cigar lighting machine & match boxes		5.00
Dishes		5.00
12 spittoons	1941.50	12.00

[431]

COPY.

Policy 2661130.

Furniture & Fixtures—New Hampshire.

Item	Amount
Work board	75.00
Bar & back bar & rail	300.00
Cash Register	225.00
Lino*el*eum	50.00
Safe	50.00
Office Furniture	50.00
Pictures	50.00
Elk Horns	50.00
Chairs	25.00
Tables	20.00
Stove	20.00
Lighting plant	130.00
Clock	25.00
Show cases	75.00
Ornaments	10.00
Spittoons	10.00
Portieres	25.00
Stand Carved Eagle	50.00
Ponograph & ~~fixtures~~—records (75)	100.00

Liquor racks	10.00
2 Fancy Kegs	10.00
1 Cork Puller	12.00
1 Lemon Squeezer	8.00
1 Hydrometer & tube	10 00
2 Keg stands	5.00
Buckets, mops, window cleaners & broom	5.00
Water system & piping	100.00
	1500.00

[432]

Patent brush.

1 Phonograph with 75 *Peckords.*

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 23, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[433]**

Defendant's Exhibit No. "A-5" [Waybills].

ILWACO RAILROAD & NAVIGATION COMPANY.

Series and No. 444.
Date June 16, 1908.

* * * * * * * * * * * * * * * * * * *

From Ilwaco. To Long Beach. Car

* * * * * * * * * * * * * * * * * * *

Full name of shipper, point of shipment, original car, connecting carrier and previous waybill reference.	Consignee, destination marks and routing beyond destination of waybill.	Number of packages, articles, and classification conditions.	Weight		Rate.	Freight charges.	Advances in detail.	Total prepaid.
			Detail.	Total.				
Wm. Black.	Wm. Black. (42)	24 Bbl. Liquor all only part full. 2 show cases. 1 cash register. 5 chairs. O. K.		40 00	7½	3.00		3.00

* * * * * * * * * * * * * * * * * * *

Agent at destination will stamp herein the date received.

Rep't.
June 16-08.
Long Beach.
Wn. [434]

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Cent. Nat. Fire Ins. Co.

ILWACO RAILROAD & NAVIGATION COMPANY.

Series and No. 476.
Date June 23, 1908.

* * * * * * * * * * * * * * * * * * * *

From Ilwaco.	To Long Beach.	Car						
Full name of shipper, point of shipment, original car, connecting carrier and previous waybill reference.	Consignee, destination marks and routing beyond destination of waybill.	Number of packages, articles, and classification conditions.	Weight Detail.	Weight Total.	Rate.	Freight charges.	Advances in detail.	Total prepaid.
Wm. B.	Wm. Black. (163) Do.	52 cs. Liquor O. K.		20 00	7½	1.50		1.50

* * * * * * * * * * * * * * * * * * * *

Agent at destination will stamp herein the date received.

Rep't.
June 24–08.
Long Beach.
Wn. [435]

Defendant's Exhibit "B" [Bank Statement].

Case No. 1297. United States District Court, Western District of Washington. William Black vs. Central Nat. Fire Ins. Co.

Please examine*d* and report promptly.

Deposits—Wm. Black—Year 1912—in account with THE FIRST NATIONAL BANK OF ASTORIA, OREGON.

Dr.					Cr.
	1912				
	Jan.	1	Balance		1116.01
		5	Cash		119.30
		6	"		21.50
		11	"		28.33
		24	"		90.10
		30	"		100.30
	Feb.	6	"		40.
		12	"		104.
		17	"		31.
		21	"		10.60
		24	"		50.
		24	Note		1000.
		26	Cash		16.65
		29	"		57.13
				308.38	
	Mar.	5	"		73.15
		7	"		20.00
		7	"		84.50
		12	"		18.
		16	"		32.
		21	"		44.15

	28	"		53.75
			320.55	
Apr.	5	"		84.36
	9	"		67.50
	10	"		40.
	15	"		65.58
	17	"		49.
	20	"		11.35
	23	"		72.25
	26	"		26.80
	27	"		50.
			466.84	
May	2	"		179.70
	3	"		71.10
	10	"		70.35
	14	"		65.56
	18	"		100.
	22	"		26.50
	23	"		47.50
	27	"		20.
	31	"		53.25
			633.96	

[436]

1912				
June	3	Cash		72.25
	7	"		81.50
	14	"		39.90
	24	"		180.00
			373.65	
July	5	"		61.50
	9	"		160.
	12	"		47.50

	17	"	55.
	20	"	960.
	26	"	10.
Aug.	7	"	61.50
	9	"	14.65
Sep.	10	"	61.50
Oct.	10	"	61.50
Nov.	8	"	54.50
Dec.	11	"	61.50

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [437]

Defendant's Exhibit "C" [Letter].

Case No. 1297. United States District Court, Western District of Washington. William Black vs. Central Nat. Fire Ins. Co.

WM. BLACK,
LONG BEACH, WASH.

July 3rd, 1912.

Davenport Dooley Co.
Portland,
Or.

Dear Sir

I have *meet* with a loss on June 27 *with doubtles* you have been notified. Now I wish you to send adjuster or *represetative* as I wish to Clean up premises in order to rebuild.

Yours Respct.

WM. BLACK.

[Endorsed]: Received Jul. 5, 1912. Davenport-Dooly Co.

"Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [438]

Defendant's Exhibit "D" [Letter].

Case No. 1297. United States District Court, Western District of Washington. William Black vs. Central Nat. Fire Ins. Co.

WM. BLACK,
LONG BEACH, WASH.

Sept. 5th, 1912.

W. G. LOYD
Adjuster Fire losses
Portland Or.

Dear sir

Your*s* letter received, and in reply will say I will give you untill*l* the 10 of Sept to adjust this my claim. You can suit your *pleshure* about it. I will then *comense* suit for its *colection.*

Truly yours
WM. BLACK.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [439]

Defendant's Exhibit "E" [Letter].

Case No. 1297. United States District Court, Western District of Washington. William Black vs. Central Nat. Fire Ins. Co.

WM. BLACK,
LONG BEACH, WASH.

Aug 29th 1912.

Davenport-Dooly Co; Portland Or

Agents of Central National Fire Insurance Comp. of Chicago Ill.

Dear sir

I hold Policy No. 590757 on this Company and have been awaiting for a settlement of policy since June 27 and think I have been treated *veary roten;* have had no one to come here to *ajust* my loss or give me any information. Now I demand an *emeadite* settlement or I will at once take steps to *colect* it.

Yours truly,

WM. BLACK.

please let me *here* from you at once.

[Endorsed]: Received Aug. 30, 1912. Davenport-Dooly Co.

"Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[440]**

Defendant's Exhibit "F" [Letter].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Cent. Nat. Fire Ins. Co.

WM. BLACK,
LONG BEACH, WASH.

Sept. 12th 1912.

Mr. W. G. Lloyd,
Adjuster Fire losses,
Portland, Or.

Dear Sir

Your letters of Sept. 10th have been *refered* to my Lawyers.

Yours truly,
WM. BLACK.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [441]

Defendant's Exhibit "G" [Letter].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Central Nat. Fire Ins. Co.

WM. BLACK,
LONG BEACH, WASH.

Long Beach, Wash., Aug. 23, 1912.

Mr. Lloyd,
Portland, Ore.

Dear Sir

Enclosed please find Proofs of Loss as requested.

Yours respect'y,
WM. BLACK.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[442]**

Defendant's Exhibit "H" [Letter].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Central Nat. Fire Ins. Co.

Long Beach, Wash., Aug. 19th, 1912.

Mr. W. G. Lloyd,
Portland, Ore.,

Dear Sir

I have been waiting since June 27 for you to come down & inspect the site of my building that was burnt on that date. I wish to clear up the rubbish from place but do not want to touch anything till you have *b*een it. Mr. Whalley of the New Hampshire Ins. Co. refers me to you hence this letter.

I wish you would make it a point to come as soon as possible.

Yours respect'y,
WM. BLACK,

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[443]**

Defendant's Exhibit "I" [Letter].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Cent. Nat. Fire Ins. Co.

WM. BLACK,
LONG BEACH, WASH.

Oct. 11th, 1912.

W. G. Lloyd,
Portland, Ore.

Dear Sir

What has struck you? I have complied with the law. Send you with proof of loss *witch* you refuse to receive as such and claimed in your letter that it was a memorised list. As far as I am or was concerned that letter closed the matter between you and me. I have been treated *roten* by you. You have never called on me and I never saw you. This has been my first fire and I have had no *exsperince* in *maters* of this kind and want no more. I *inshured payed* my money and have *meet* with a loss and want mine and I am going to have it; and take this from me I have furnished you with every thing covering this my loss.

WM. BLACK.

Say you had better save your stamps I will get them just the same with a 2 cent stamp or do you take me for a farmer.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[444]**

Defendant's Exhibit "J" [Letter].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Cent. Nat. Fire Ins. Co.

October, 9th, 1912.

Mr. Wm. Black,
Long Beach, Wash.

Dear Sir:—

On September 10th, 1912, we wrote you requesting further data and information relative and supplemental to papers filed by you under policy No. 590757 issued to you by the Central National Fire Insurance Co.

To this you replied on September 12th, 1912, that you had referred the matter to *you* Lawyers, and since which time nothing further has been heard. If you intend making any claim, we notify you that you comply with our request of September, 10th, 1912, above referred to.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[445]**

Defendant's Exhibit "K" [Letter].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Central Nat. Ins. Co.

August 31st, 12.

Mr. Wm. Black,
Long Beach, Wash.

Dear Sir:—

I am in *reciept* of your favor of the 23rd, enclosing

papers purporting to be proofs of loss under policy No. 590757 and policy No. 2661130 issued to you by the Central National Fire Ins. Co. and the New Hampshire Insurance Co. The same will be given *considertion* and you will be advised further at the earliest possible moment.

Very Truly Yours,

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[446]**

Defendant's Exhibit "L" [Letter].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Central Nat. Fire Ins. Co.

September 10th, 1912.

Mr. Wm. Black,
Long Beach, Wash.

Dear Sir:—

We are in *reciept* of your favor of August 23rd, enclosing papers purporting to be proofs of loss under policy No. 590757 issued to you by the Central National Fire Insurance Company, making claim for loss by fire alleged to have occurred on June 27th, 1912.

The said papers can not be accepted as satisfactory, for the following among other reasons which may subsequently be made to appear.

The list of articles *inumerated* is only a *mermorized* list and also contains articles which are not items of stock.

The amount set *fourth* in said list as representing the value are grossly in excess of the true sound value of said articles, alleged to have been destroyed.

Under the terms and conditions of your policy you are required to exhibit the last authentic inventory taken of your stock or a certified copy thereof. You will also supply bills of purchases of stock since the last said inventory, or if said bills of purchases have been destroyed then certified copies of the original bills.

You are *alos* required to supply a record of your sales made of stock since the date of inventory above *reffered* to.

The said papers cannot therefore be accepted as satisfactory **[447]** and are held subject to your order.

This company hereby neither admits nor denies any liability to you.

Very Truly Yours,

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[448]**

Defendant's Exhibit "M" [Letter].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Central Nat. Fire Ins. Co.

August 20th, 1912.

Mr. Wm. Black,
Long Beach, Wash.

Dear Sir:—

I have your letter of August 19th, relative to pur-

ported claim by reason of fire and in reply I beg to advise as follows.

If you have a claim under Pol. No. 590757 issued to you by the Central National Fire Ins. Co. of Chicago, Ill., and Pol. No. 2661130 issued to you by the New Hampshire Fire Ins. Co. of Manchester, N. H., both of which Companies I represent and on behalf of said Companies I desire to call *you* attention to the terms and conditions as set forth in lines from 67 to 112 inclusive.

You are hereby required to submit proofs of loss as set forth and in accordance with instructions thereby given in said policies, within sixty days of the fire.

Upon above compliances I will give the matter attention.

The said Insurance Companies, above referred to, hereby neither admit nor deny liability.

Very Truly Yours.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 22, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[449]**

Defendant's Exhibit "Y" [Bills, etc.].

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Cent. Nat. Fire Ins. Co.

(Parts only of this exhibit, being bill of 1908, Green River Whiskey, Bill of June 26, 1909, Old Crow, and Statement.)

Sol. Blumauer. Eugene Hoch.

BLUMAUER & HOCH.

Wholesale Dealers and Importers in Wines and Liquors.

No. 105–107 12th Street

Wholesale.
Importers.
Liquors & Cigars.
Blumauer & Hoch.
Sole Agents for
Anheuser-Busch Budweiser Beer.
Dodson Extra Special Whiskey.
Old Certificate Whiskey.
O. K. Home Club.
Coronet Dry Gin.
Cruse Fils Clarets & Sauternes.
Johnson's Clarets and Sauternes.
Deinhard and Leiden Rhine Wines.
Beaver Brand Wines.
White Rock Mineral Water.
Terms.
"Exhibit A."

PORTLAND, OR., April 2, 19*18*.

Sold to Wm. Black.

Ilwaco, Wn.

5 Barrels Green River 36.09
36.89
35.15
36.76
37.02

181.91 gal. @ 2.75 500.25

5 Barrels Pensvick Rye 39.25
39.74
39.74
39.11
38.22

196.06 gal. @ 2.60 509.75

$1010.00

DUPLICATE. [450]

* * * * * * * * * * *

Sol. Blumauer. Eugene Hoch.

BLUMAUER & HOCH.

Wholesale Dealers and Importers in Wines and Liquors.

No. 105–107 12th Street

Wholesale.
Importers.
Liquors & Cigars.
Blumauer & Hoch.
Sole Agents for
Anheuser-Busch Budweiser Beer.
Dodson Extra Special Whiskey.
Old Certificate Whiskey.
O. K. Home Club.
Coronet Dry Gin.
Cruse Fils Clarets & Sauternes.
Johnson's Clarets and Sauternes.
Deinhard and Leiden Rhine Wines.
Beaver Brand Wines.
White Rock Mineral Water.
"Exhibit A."
Terms.

PORTLAND, OR., June 26, 1909.

Sold to Wm. Black.

Ilwaco, Wn.

5 Barrels Old Crowe 201.93 gallons @ 2.65 $535.10

(Shipped direct by W. A. Gaines & Co., Frankfort, Ky.)

DUPLICATE. [451]

STATEMENT.

Interest charged after maturity.

Phones, (Main 211,
(A 6004 A 6005.

Portland, Oregon, Apr. 24, 1913 191

Mr. Wm. Black,
Long Beach, Wn.

IN ACCOUNT WITH

BLUMAUER & HOCH.

Wholesale dealers in and Importers of
Imported and Domestic
Wines and Liquors

Sole Agents Old Kentucky Home Club Whiskey and
Dodson's Extra Special Whiskey.

"Exhibit A" 105–107 TWELFTH STREET.

1908.		To Balance.	
Apr.	2.	To Mdse., Ilwaco, Wn	1010.00
"	"	" "	96.35
July	25.		40.50
Sept.	"		44.25
	26.	freight	1.65
Nov.	30.		148.25
Dec.	1.	freight	3.05
1909.			
Feb.	2.		166.50
	3.	freight	3.50
Apr.	9.		46.25
	10.	freight	2.80
June	11.		525.70
	14.	freight	19.35
	26.		535.10
			2643.25

CREDIT:

1908.			
Sept. 22.	Cash	1146.85	
Nov. 19.	25 Bbl. Certificate	1029.37	
1909.			
Sept. 25.	Cash	200.00	
Nov. 30.	"	100.00	
1910.			
April 26.	"	167.00	
"	Dicit.	.03	2643.25

[452]

Defendant's Exhibit "X" [Invoice].

(Last page only)

Case No. 1297. United States District Court, Western District of Washington. Wm. Black vs. Cent. Nat. Fire Ins. Co.

* * * * * * * * * *

Invoice.

Established 1870. Order No.

BROWN-FORMAN CO.

Incorporated.

KENTUCKY WHISKIES.

Registered Distillery No. 14.

ST. MARY'S, KY.

LOUISVILLE, KY., Jan. 25, 1911.

Sold to Wm. Black,

Address, Long Beach, Wash.

Salesman—Waldman.

TERMS: 90 days or 4% cash 30 days

Shipped Via F. O. B.

Form 7

We hereby guarantee that the articles invoiced

below are not adulterated, or misbranded, within the meaning of the National Foods and Drugs Act of June 30, 1906.

BROWN-FORMAN CO. (Inc.)

1 Bbl Fox Mountain proof gals 34.99 6 50 162.43

DUPLICATE

Exhibit E.

Important Notice.

For the protection of our customers, all shipments should be weighed at the station, and if under weight, should be endorsed on the freight bill by the Railroad Company's Agent. One case Quarts Weighs 50 lbs. One case Pints Weighs 52 lbs. One case fives weighs 42 lbs. One case Half Pts. weighs 57 lbs.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 23, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[453]**

Assignment of Errors.

The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers occurred at the trial of the cause, to wit:

I.

Said District Court erred in overruling the objections of the defendant to the following question propounded by counsel for plaintiff to the witness, S. A. Madge:

Q. Just tell the jury what kind and character of stock of liquors Mr. Black kept on hand.

To which counsel for the defendant objected on the

ground that it was not close enough unless shown to be immediately preceding the fire, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed. Said witness having previously testified that he resided at Olympia; had been in the insurance business for about five years; had been deputy collector of internal revenue; had not been in Black's saloon since 1908.

II.

Said District Court erred in overruling defendant's motion to strike out the testimony of the witness, S. A. Madge, to which ruling of the Court defendant excepted, and which exception was then and there allowed; said witness having previously given the following testimony:

I ceased to be deputy collector of internal revenue just about five years ago. I was in his place of business at Long Beach once or twice before I went out of the service. It was about five years ago. I was in his place of business at Ilwaco, also in his place of business after he moved to Long Beach **[454]** I visited his place of business in my official capacity as deputy collector of internal revenue. The stock of goods that he carried in Ilwaco, I remember very distinctly. I do not remember so distinctly about the stock of goods at Long Beach after he moved up there, but my impression is that it was the same stock of goods as the saloon in Ilwaco. It was a small town, and I was impressed with the stock of goods that he carried, because it was so far beyond the class of goods that are kept in saloons in towns

of that size, that I made an inquiry, I think, and some investigation to find out why he was carrying a stock which was all double stamped goods; double stamped goods are straight distillery goods. He carried a very high grade of liquors, Old Crow, Hermitage, Penwick Rye, and that class of goods. I think he had one barrel that ran up to 120 proof; a very high grade of goods, and he had quite a stock of it. It was in barrels, and the barrels were racked up and the barrels were all tapped. I tested quite a bit of it, because I felt it was my duty to do so on account of the size of the town, but he gave me a very reasonable explanation of why he carried that class of goods in his place. He had some very old liquors, reimported goods; reimported goods are goods that are taken across the water and brought back here to increase the quality of the liquor. Old Crow, three years old, when it would be put out of bond, would cost in the neighborhood of three to four and a half a gallon, that is the younger age. Six or seven years old, it would be worth seven to ten a gallon. If ten years old it is worth seven, some of it ten. Liquor that is six years old would be worth five or six a gallon. It is a lot owing to the amount of absorption and the amount of liquor lost. Some barrels will char quicker than others and the proof will run up higher; that means there is a loss of quantity **[455]** in the barrel and a higher proof. Mr. Black's saloon is a higher class of saloon than the general run. He had quite a large supply of liquors. I think he kept a pretty fair supply of cigars, that is my impression. Rectified goods are compounded goods. Certain

wholesalers and rectifiers have a license to rectify goods, and they take alcohol and Green River whiskey and mix them together, putting water in and bring the proof down to about sixty or eighty-five, somewhere along there, and put coloring matter in there, and sometimes caramel, to give it a mellow taste. I do not think he had a single bit of rectified goods in his place. I think all of his goods were bottled in bond. They are bottled under Government supervision at the bonded warehouses at the distilleries, and they are bottled at 100 proof and the Government stamp is put over the cork. There is a very heavy penalty for refilling any of these bottles. It is our duty to see that none of these bottles are refilled. These liquors I spoke of were in Mr. Black's saloon in Ilwaco. I was in Mr. Black's saloon the last time about five years ago. I was in his saloon only once after he moved to Long Beach, that was in 1908.

III.

Said District Court erred in overruling the objection of the defendant to the following question propounded by counsel for plaintiff to the witness, S. A. Madge.

Q. For instance, if a person kept that for several years, supposing he got a barrel of these double stamped goods in 1903, and it cost three or four and a half a gallon, what would be its value six or seven years later?

To which counsel for the defendant objected on the [456] ground that the witness was not qualified to give testimony as to the value of liquor, which

objection was overruled, to which ruling the defendant excepted, and the exception was then and there allowed.

IV.

Said District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to the witness, S. A. Madge.

Q. Do you know what they cost per gallon, barrel, etc.?

A. Well, Old Crow would cost in the neighborhood of three year old, when it would be put out of bond, would cost in the neighborhood of three to four and a half a gallon, that is the younger age.

Counsel for defendant moved that said answer be stricken out for the reason that said witness was not qualified; which motion was denied by the Court, to which ruling the defendant then and there excepted, which exception was allowed.

V.

Said District Court erred upon the trial of said cause, in permitting counsel for the plaintiff to offer, and in admitting over the objection and exception of the defendant, plaintiff's alleged proof of loss (Plaintiff's Exhibit 3), which was objected to by the defendant for the reason that it contained property not covered by the policy, and on the further ground that it contained a gross and exaggerated value of the property, and was not such a proof of loss as is required by the terms of the policy, which exhibit is as follows: **[457]**

Wm. Black v. Central National Fire Insurance Co. Plaintiff's Exhibit 3.

INVENTORY ATTACHED TO AND BEING PART OF BULK LIQUORS ON HAND, PROOF OF LOSS, UNBROKEN PACKAGES.

bbl. tapped gallon old.

ot tapped	5 bbls.	Old Crow Jan. 2, 1906		1000.00
ntapped	4 —	Cedar Brook McBrayer	1903	800.00
bbls. not apped	3 —	Green River	1902	750.00
gal. drawn.	3 —	Penryck	1904	400.00
ot tapped	1 —	Old Crow	1899	350.00
bbl. not apped	1 —	Fox Mountain	1896	400.00
	2 —	A. G. McBrayer single stamp		300.00
	1 —	Wicklow		125.00
	1 —	California Port wine		75.00
	1½	Imported Port wine 16 gall.		75.00
	1½	California Brandy 16 gall.		40.00
	1½	Rum Hudson Bay		50.00
	4 gall.	Gin Box jug		9.00
	5 Cases	Whiskey flasks		20.00
Untapped	2 Bbls.	Clark Bros. whiskey		214.35
	1000	Attencion Cigars		35.00
	500	Alhambra —		17.00
	5 bbls.	Bottled beer		47.50
	900	Y. & B. Cigars		81.00
	800	El Rayo —		72.00
	500	Gato —		45.00
	1600	Optimos —		144.00
	500	Van Dyck —		45.00
	100	Carabana —		9.00
	100	Loveras —		9.00
	200	Carletons —		12.00
	200	Eschelles —		12.00
	800	Manilla —		40.00
	7 Boxes	Egyptian Cigarettes		7.00
	[458]			
	1 box	Egyptian Luxury Cigarettes		2.50
	1 —	Pall Mall Imported —		2.50
				5189.35

Qty		Item	Bottles		Amount
5	Cases	Joe Gideon whiskey			62.50
15	—	Joel B. Frazier &	8	bottles in show case	180.00
22	—	Roxbury Rye	7	bottles in show c.	220.00
4	—	Guggenheimer	5	— — — —	40.00
4	—	Old Crow Bourbon	9	— — — —	50.00
4	—	Hermitage	6	— — — —	50.00
4	—	Gibson Rye	3	— — — —	40.00
2	—	Pebble Ford	8	— — — —	25.00
2	—	McBrayer	9	— — — —	27.00
1	—	Cyrus Noble	4	— — — —	14.00
3	—	Atherton	9	— — — —	40.00
4	—	W. H. Lacey			40.00
2	—	Yellowstone			25.00
2	—	Holland Gin Imp.	14	— — — —	45.00
2	—	Gordon — —	9	— — — —	30.00
2	—	Martelle Brandy —	6	— — — —	40.00
2	—	J. Hennesy — —	9	— — — —	36.00
4	—	Sazarae — —	3	— — — —	50.00
2	—	Scotch Whiskey —	10	— — — —	30.00
1	—	Old Curio — —			20.00
4	—	Sloc Gin			40.00
1	—	Jamaica Rum —			14.00
2	—	Canadean Club Whiskey	7	— — — —	17.50
1	—	Mountain Dew Scotch —			14.00
3	—	Italian Vermouth			24.00
1	—	French —			9.00
2	—	Maraschino Cherries			12.00
2	—	Rock & Rye			14.00
2	—	Pineapple Rock & Rye			20.00
					1166.50

[459]

Qty		Item	Amount
1	Case	Benedictine Imp.	35.00
6	bottles	Creme de Menthe Imp.	12.00
6	—	Creme de Cocoa —	12.00
1	—	Picon	2.00
2	—	Boonekamp bitters	2.00

2	Cases	Claret wine	9.00
2	—	Muscat —	9.00
2	—	Angelica —	9.00
2	—	Madeira —	9.00
2	—	Sherry —	9.00
2	—	Tokay —	9.00
4	—	Cresta Blanca—Margam	36.00
2	—	Sparkling Burgundy pts.	26.00
2	—	— — qts.	26.00
3	—	Mont Rouge—Sauterne —	30.00
2	—	Mont Rouge—Burgundy —	24.00
6	Doz.	Beer Glasses	12.00
2	—	Water —	2.75
5	—	Whiskey —	8.00
2	Sets	Measures Copper	12.00
2	—	Funnels —	12.00
8	Doz.	Bar & Glass Towels	24.00
8		Decanters	8.00
25	gross	Corks all sizes	4.00
			353.75

[460]

4	Doz.	1 gal. Demijohns	20.00
5	—	½ — —	15.00
2	—	Champagne glasses	4.00
2	—	Port wine —	3.00
2	—	Brandy —	3.00
2	—	Cocktail —	3.00
2	—	Vermouth —	3.00
2	—	Benedictine —	3.00
3	Cases	Sauterne Van Schuyver	13.50
2	—	Old Tom Gin J. W. Nicholson Imp.	22.50
2	—	Lash Bitters	16.00
1	—	Ginger Brandy	8.00
2	—	Virginia Dare Wine	12.00
1	—	Lyons Cocktails	12.00
1	—	Mumms Champagne	37.00

1 Can	Alcohol 4¾ gall.	12.00
2 Cases	Dameana Bitters	16.00
1 Drum	Bass's Ale, Imported	16.00
1 case	Stout Imported	14.00
2 Bbls.	Budweiser beer, qts.	25.00
28 bottles	Lock wine	11.00
1 qt.	Jamaica Ginger	1.50
1 —	Essence Peppermint	1.50
2 Cases	White Rock Mineral Water	17.00
1 —	Bartlett — —	8.50
1 bbl.	Soda Water	8.50
1 —	Ginger Ale	8.50
5 —	Weinhard bottled beer	45.00
2 Cases	Grape Juice, large size	9.00
		320.50

[461]

1 bbl. Mellwood Whiskey about 15 gall.	37.50
1 keg — — 3 —	7.50
1 — Old Crow 2½ —	6.25
20 bottles various liquors on back bar	25.00
126 — in show cases aver. 1.25 p. bot.	157.50
6 broken boxes cigars, about 300 ave. 75.00 per M.	22.50
Cordials, mineral waters, soda waters, beer and ales in back bar	30.00
20 gall. Blackberry brandy	50.00
1 — Dry Sherry 1.25 gal.	12.50
	348.75

Recapitulation:

Sheet 1	5189.35
— 2	1166.50
— 3	353.75
— 4	320.50
— 5	348.75
	7378.85

[462]

For further information in regard to value of the different whiskey would refer you to the Internal Revenue offices at Tacoma, also Mr. Locke of the firm of Greenbaum Bros., Louisville, Kentucky, residing at 1130 Hawthorne Ave., Portland, Julius Friedman of Blumaher & Hock and Mr. Adams of Fleckenstein & Son, Frank Botcfuhe (?) and Julius Wellman of Brown, Forman & Co. As to cigars I bought of Mason, Ehrman & Co., Gurst & Co., Hart Cigar Co., Taylor of Astoria, representing Sohbacker & Co. If necessary will furnish sworn affidavits from above people and other prominent persons who are familiar with my stock as I wish you to understand that I desire the fullest investigation. That I have nothing to conceal and can substantiate everything that is stated in above inventory.

Remaining

Yours respecty.

WM. BLACK. **[463]**

No. of Policy 590757 Amount of Policy $5000.00

PROOF OF LOSS

to the

Central National Fire Insurance Company of Chicago, Ill.

BY YOUR POLICY OF INSURANCE NUMBERED 590757 issued at your Agency at Long Beach, Wash. commencing at 12 o'clock noon, on the 17th day of June, 1912, and terminating at 12 o'clock noon, on the 17th day of June, 1913, you insured Wm. Black against loss and damage by fire to the amount of Five Thousand Dollars according to the terms and conditions of said Policy, the written por-

tion thereof, together with an exact copy of all endorsements, assignments and transfers, being as follows, viz.:

MERCHANDISE FORM.

$5000.00 on his stock of merchandise, consisting principally of wines, liquors, soda and mineral waters, beer & cigars and all other goods, wares and merchandise not more hazardous kept for sale by assured, while contained in two story shingle roofed Frame building and adjoining and communicating additions thereto, while occupied as saloon, and situate lot 6, blk. 6, Tinkers north addition to Long Beach, Pacific County, Wash.

$——— on store furniture and fixtures while contained in said building.

$——— other concurrent insurance permitted.

POWDER AND KEROSENE. — Permission granted to keep*t* for sale not to exceed fifty pounds of gunpow*s*er and five barrels of kerosene oil, the latter to be of not less than the United States standard of 110 degrees, neither to be handled or sold by artificial light.

ELECTRIC LIGHTS.—Permission for electric lights, it being agreed that wires shall be doubly coated with approved insulating material, and protected where they enter buildings, by porcelain or hard rubber insulators, and shall also have fusible cut-offs.

LIGHTNING CLAUSE.—This policy shall cover any direct loss or damage caused by lightning, (meaning thereby the commonly accepted use of the

term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm,) not exceeding the sum insured, nor [464] the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy: PROVIDED, however, if there shall be any other insurance on said property this company shall be liable only pro-rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not; and provided further that, if dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this company shall not be liable for any loss or damage to such property resulting from any electrical injury or disturbance, whether from artificial or natural causes, unless fire ensues, and then for the loss by fire only.

Attached to and forming a part of Policy No. 590757 of the CENTRAL NATIONAL FIRE INSURANCE CO. OF CHICAGO, ILLINOIS.

HENRY KAYLER,
Agent.

Loss, if any, payable to Wm. Black.

The total insurance on said property, or any part thereof, at the time of the fire, including this policy, was Five Thousand Dollars.

A fire occurred on the 27th day of June, A. D. 1912, at about the hour of 1:30 o'clock A. M., by which the property insured was destroyed, or damaged, as herein set forth, and which originated as follows: Cause unknown.

THE CASH VALUE of each specified subject insured at the time of the fire and the actual loss and damage thereon by said fire as ascertained by appraisal, or by mutual agreement, and the whole amount of Insurance thereon were as follows:

1st Item of Policy. Sound value, $8000.00. Total loss, 8000.00. Total Insurance, 5000.00. Total Claim Under Insurance, 5000.00. Claimed of this Insurance Co. 5000.00.

And the insured claim of the above-named COMPANY, by reason of said loss, damage, and Policy of Insurance, the sum of Five [465] Thousand Dollars, in full of their proportion of said loss.

The property insured belonged exclusively to Wm. Black.

If the loss is on building, state whether Real Estate is owned in fee simple or held on lease. Fee simple.

State the nature and amount of incumbrance at the time of the fire. None.

The total value of property saved is $ none as per statement attached hereto, marked Schedule ———.

The building insured, or containing said property, was occupied in its several parts by the parties hereinafter named and for the following purposes, to-wit: William Black, saloon, and for no other purpose whatever.

The said fire did not originate by any act, design, or procurement on part of assured, nor on the part of any one having any interest in the property insured, or in the said Policy of Insurance; nor in consequence of any fraud or evil practice done or suffered by

said assured, that nothing has been done by or with the privity or consent of assured to violate the conditions of the Policy, or to render it void; and then no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and in the possession of the said insured at the time of the said fire; that no property saved has been in any manner concealed, and that no attempt to deceive the said Company as to the extent of said loss or otherwise, has in any manner been made. Any other information that may be required will be furnished on call, and considered a portion of these proofs.

It is furthermore understood and agreed that all bills, invoices, schedules and statements made by the assured, and attached to this Proof of Loss, are to be incorporated into this proof, and are hereby duly sworn to and made a part thereof.

The furnishing of this blank to assured, or making up proofs by Adjuster for Company, is not to be considered as a waiver of any rights of the Company. **[466]**

Witness my hand at Long Beach, Wash. this 22nd day of August 1912.

WILLIAM BLACK.

Personally appeared Wm. Black, signer of the foregoing statement who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of before me this 22d day of August 1912.

HENRY KAYLER,

Notary Public in and for the State of Washington, Residing at Long Beach, Wash. **[467]**

VI.

Said District Court erred upon the trial of said cause in overruling defendant's motion to strike out the following answers given by the witness, Don H. Dickinson:

Q. Do you know the amount and value of the liquors that Black had there?

A. No, sir, I don't the exact amount; I know it is way up in the thousands.

Defendant moved the Court that said answer be stricken out as it was not shown that said witness was competent to testify, and for the reason that said answer was not responsive to the question, which motion the Court denied, and to this ruling of the Court the defendant then and there excepted, which exception was allowed.

VII.

Said District Court erred in overruling the objection of counsel for defendant to the following question propounded by counsel for plaintiff to the witness, William Black:

Q. What was the market value of the goods lost by you in this fire of June 27, 1912?

To which counsel for the defendant objected upon the ground that it was not shown that the witness was qualified or familiar with the market value of said property; which objection was overruled, to which ruling defendant then and there excepted; which exception was allowed.

VIII.

Said District Court erred upon the trial of above-entitled cause in denying the motion of counsel for

defendant to strike out the testimony of the witness, W. A. Hagermeyer, to which ruling of the Court the defendant then and there [468] excepted, which exception was allowed. Said witness having previously testified as follows: I reside in Tacoma. Am in the retail liquor business. I have bought and sold liquors about three years. Am acquainted with the brand of whiskey known as "Old Crow," also with the brand known as "Penwick Rye." Am also acquainted with the brand known as "Cedar Brook McBrayer's." The fair market value per gallon of the whiskey known as "Old Crow" brand of the 1906 vintage, double stamp, I should judge ought to be five or six dollars per gallon. I should judge the fair market value of the Cedar Brook McBrayer's 1903 vintage, double stamp, should be about six dollars, somewheres along in there, and the Green River double stamp 1902 vintage, ten and twelve years old, not less than seven dollars. I have some goods that were not bought by myself, but bought by my predecessor, wines and so on, that are over twelve years old. I still have parts of them on hand. The prices which I gave are prices where liquor is sold by the gallon out of a retail store. I am not in the wholesale liquor business. I don't know anything about the wholesale value of these liquors during June, 1912, I do not know what wholesalers have to pay for their goods. I do not think that these prices which I mention would include the retailer's profit. I hardly think there would be any profit in selling at that price. I bought some of this kind of whiskey in 1912. I do not remember what my partner paid for

them. I didn't myself, personally, buy any of these ages that have been mentioned. If a man was to buy a barrel of any of these different brands and ages of liquors mentioned in 1912 he would have to pay somewhere near I think those prices. That would be to buy by the barrel. The only way I bought any of these ages was in partnership. My partner did the buying and I paid the bills. [469] I think my partner bought some Old Crow of the year 1906. As near as I can remember he paid about five dollars per gallon, from five to six and a half. He bought it in 1912 in San Francisco. I think in June of 1912.

IX.

Said District Court erred upon the trial of said cause in refusing to sustain the motion of the defendant for judgment of nonsuit made at the close of plaintiff's testimony on the ground that the plaintiff had refused to furnish the defendant with copies of his purchases and invoices and on account of his refusal to perform any of the other terms or conditions on his part to be performed, and for the further reason that the market value of the property had not been shown, which motion was denied by the Court; to which ruling of the Court the defendant excepted, and the exception was then and there allowed.

X.

Said *District erred* upon the trial of the above cause in denying the motion of counsel for the defendant that the Court direct a verdict in favor of the defendant, for the reason that the testimony conclusively showed that the plaintiff had been guilty

of false swearing in violation of the terms of the policy, and especially in connection with his alleged proof of loss; which motion was denied by the Court, to which ruling defendant then and there excepted, which exception was allowed.

XI.

Said District Court erred in giving and entering a judgment in favor of the plaintiff and against the defendant for the sum of five thousand dollars, with interest thereon at the rate of six per cent per annum from the sixth day of December, 1912. **[470]**

XII.

Said District Court erred in giving and entering a judgment in favor of the plaintiff and against the defendant for interest on $5000.00 at six per cent per annum from December 6, 1912.

XIII.

Said District Court erred in denying the motion of defendant to set aside the verdict and judgment, and to grant a new trial.

XIV.

Said District Court erred in refusing to instruct the jury as requested by defendant, as follows:

The insurance policy in this case provides that the entire policy shall be void if the insured shall be guilty of any fraudulent or false swearing touching any matter relating to the insurance or the subject thereof, whether before or after loss. If you find from the evidence that the plaintiff in this case has wilfully, or carelessly, made claim for loss exceeding the true market value of the property destroyed, or wilfully or carelessly made claim for property not destroyed

in the fire and made affidavit to the same, then in that event he cannot recover in this action. False swearing consists of stating a fact as true which the party does not know to be true. If the plaintiff has inserted in his sworn proof of loss any articles as burned which were not burned and knowingly puts such false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover.

XV.

Said District Court erred in refusing to instruct the jury as requested by defendant, as follows: **[471]**

It appears from the evidence in this case that the plaintiff on or about the 25th day of August, 1913, submitted to the defendant a sworn proof of loss, wherein the plaintiff claimed that the value of the property destroyed in the fire and covered by the policy amounted to the sum of $7378.87. If you find from the evidence that the plaintiff knew the property destroyed in the fire was of a value substantially less than the amount or that he could, by the exercise of reasonable diligence, have known that said property was of substantially less value, he cannot recover in this action, even though the actual market value of the property exceeds the sum of five thousand dollars.

XVI.

Said District Court erred in refusing to instruct the jury as requested by defendant, as follows:

If you find from the evidence that the plaintiff in his sworn proof of loss, placed an excessive valuation

on the whole property burned, or on single portions or quantities thereof, and that such excessive claim was wilfully or carelessly made, then your verdict should be for the defendant.

XVII.

Said District Court erred in refusing to instruct the jury as requested by defendant, as follows:

The jury is instructed that there is no evidence as to the market value of the case of goods and therefor they must be eliminated from the case.

XVIII.

Said District Court erred in instructing the jury, over the exception and objection of the defendant as follows: [472]

It is provided by the statute of the State of Washington (Sec. 105, Laws of 1911, p. 243), as follows:

Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interests therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurable value of the building or property or interest therein at the time such insurance is affected. Under this provision of the law I charge you that the defendant insurance company was presumed to know at the time it issued this policy of insurance in the sum of $5000.00 covering the property described in said policy; and situated in the buildings described in said policy, the value of said property. If it now claims otherwise the burden of

proof rests with the defendant to so show by a fair preponderance of the evidence.

XIV.

Said District Court erred in failing to instruct the jury that if the property described in plaintiff's complaint and in the policy of insurance was destroyed by the act, procurement or design of the plaintiff, they should retirn a verdict in favor of the defendant.

WHEREFORE, defendant prays that the judgment of the District Court may be reversed, and that said Court be directed to dismiss the complaint herein and to enter judgment for the defendant for its costs and disbursements.

COLE & COLE,
Attorneys for Defendant. **[473]**

I certify that the foregoing assignment of errors was made in behalf of the defendant above named for a writ of error herein, and is in my opinion well taken, and the same now constitutes the assignment of errors upon the writ herein.

BARTLETT COLE,
One of Defendant's Attorneys.

Due and legal service of the foregoing assignment of errors upon me, at Tacoma, Washington, this —— day of January, 1914, is hereby admitted.

——————————,
Attorneys for Plaintiff.

Filed in the U. S. District Court, Western District of Washington, Southern Division. Jan. 27, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[474]**

Petition for Writ of Error.

Now comes the Central National Fire Insurance Company of Chicago, the defendant herein, and says that on the 30th day of October, 1913, this Court entered judgment herein in favor of William Black, the plaintiff above named, and against this defendant, Central National Fire Insurance Company of Chicago, for the sum of $5,000 with interest thereon at the rate of 6% per annum from the 6th day of December, 1912, and the costs and disbursements of said action, taxed at $210.50;

That on the 1st day of December, 1913, said District Court overruled the motion of said defendant to set aside said judgment, and for a new trial in said cause, and said judgment has now become final in said District Court, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will appear more in detail from the assignment of errors, which is filed with this petition. Defendant herein now makes the following assignment of errors upon which it will rely, and which will be made to appear by the return of the said records in obedience to said writ of error herein prayed for.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to

the said United States Circuit Court of Appeals.

CENTRAL NATIONAL FIRE INSURANCE COMPANY, OF CHICAGO,

By BARTLETT COLE,

One of Attorneys for Petitioner. [475]

COLE & COLE,

Attorneys for Petitioner.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 27, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [476]

[Order Allowing Writ of Error.]

On this 28th day of January, 1914, comes the defendant above named, Central National Fire Insurance Company, of Chicago, by Bartlett Cole, one of its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error and the assignment of errors intended to be urged by it, and praying also that the transcript of record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does hereby allow a writ of error, upon the defendant giving bond, according to law in the sum of $7,000, which shall operate as a *supersedeas* bond.

Dated this 28th day of January, 1914.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 28, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [477]

Bond [on Writ of Error].

KNOW ALL MEN BY THESE PRESENTS, That we, the Central National Fire Insurance Company, of Chicago, a corporation, as Principal, and the United States Fidelity & Guaranty Company, a corporation, as Surety, are held and firmly bound unto William Black, in the sum of Seven Thousand Dollars ($7,000) to be paid to said William Black; for which payment well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals this 30th day of January, 1914.

WHEREAS, Lately at a District Court of the United States for the Western District of Washington, Southern Division, in an action pending in said court between William Black, plaintiff, and Central National Fire Insurance Company, of Chicago, defendant, a judgment was rendered against the defendant and in favor of the plaintiff for the sum of $5,000, with interest thereon at the rate of 6% per annum from December 6, 1912, and costs taxed at $210.50, and

WHEREAS, said Central National Fire Insurance Company of Chicago, is prosecuting a Writ of Error to the United States Circuit Court of Appeals to reverse the judgment in the above-entitled action given and entered by said District Court of the United States for the Western District of Washington, Southern Division, on the 30th day of October, 1913.

NOW, The condition of this obligation is such, that if the said Central National Fire Insurance Company, of Chicago, shall prosecute said Writ of Error to effect and answer all damages and costs and satisfy said judgment if it shall fail to make said plea good, then the above obligation to be void; [478] otherwise to remain in full force and virtue.

CENTRAL NATIONAL FIRE INSURANCE COMPANY, OF CHICAGO.
By FRANK E. DOOLY,
Its General and Special Agent Hereunto Authorized,
Principal.

UNITED STATES FIDELITY & GUARANTY COMPANY.
[Seal of Surety Company.]
By C. H. CAMPBELL,
Its Attorney in Fact,
Surety.

Witness:

BARTLETT COLE.
JAMES COLE.

The above bond examined and approved this 3d day of Feb., 1914.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [479]

[Writ of Error (Copy).]

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said District Court before you, between William Black, plaintiff and defendant in error, and Central National Fire Insurance Company, of Chicago, a corporation, defendant and plaintiff in error, manifest error hath happened, to the great damage of the said Central National Fire Insurance Company, of Chicago, defendant and plaintiff in error, as by its complaint doth appear, we, being willing that error, if any there has been, should be duly corrected, and full and speedy justice be done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, in said Court within thirty

days from the date hereof, in said Circuit Court of Appeals, to be then and there held. That the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States Supreme Court, this 3d day of February, **[480]** 1914, and in the one hundred thirty-eighth year of the Independence of the United States of America.

[Seal] FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington, Southern Division.

By E. C. Ellington,

Deputy Clerk, U. S. District Court, Western District of Washington.

Allowed by:

EDWARD E. CUSHMAN,

United States District Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[481]**

Citation on Writ of Error [Copy].

United States of America,
Western District of Washington,
Southern Division,—ss.

To William Black and Hayden, Langhorne and Metzger, and J. J. Brumbach, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Central National Fire Insurance Company, of Chicago, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Tacoma, in said District, this 3d day of February, in the year of our Lord, one thousand nine hundred and fourteen.

[Seal] EDWARD E. CUSHMAN,
Judge.

Due and legal service of the within Citation on writ of errors, by certified copy thereof prepared and certified to as such by Bartlett Cole, as one of the attorneys for the plaintiff in error, is hereby made upon

me at Tacoma, Washington, this 3d day of February, 1914.

HAYDEN & LANGHORNE & METZGER,
MAURICE LANGHORNE,
Attorneys for Defendant in Error. [482]

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [483]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do, in pursuance of the command of the Writ of Error within herewith transmit and herewith certify the foregoing to be a full, true and correct transcript of the record in the case of Central National Fire Insurance Company, plaintiff in error and defendant against William Black, defendant in error and plaintiff, lately pending in this District, as required by the praecipe of counsel filed in said case.

And I further certify that attached hereto are the original Writ of Error, original Citation, and original order extending time for return on Writ of Error, and original Certificate by Judge Cushman as to Rule of Court.

I further certify that the cost of preparing and certifying the foregoing transcript amounted to the

sum of $326.50, which amount has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of this Court, at Tacoma, in said District, this first day of April, A. D. 1914.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk. [484]

[Writ of Error (Original).]

In the United States Circuit Court of Appeals for the Ninth Circuit.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said District Court before you, between William Black, plaintiff, and defendant in error, and Central National Fire Insurance Company, of Chicago, a corporation, defendant and plaintiff in error, manifest error hath happened, to the great damage of the said Central National Fire Insurance Company, of Chicago, defendant and plaintiff in error, as by its complaint doth appear, we, being willing that error, if any there has been, should be duly corrected, and full and speedy justice be done to the parties afore-

said, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco in said Court within thirty days from the date hereof, in said Circuit Court of Appeals, to be then and there held. That the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, The Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States Supreme Court, this 3d day of February, 1914, and in the one hundred thirty-eighth year of the Independence of the United States of America.

[Seal] FRANK L. CROSBY,

Clerk of the United States District Court for the Western District of Washington, Southern Division.

By E. C. Ellington,

Deputy Clerk, U. S. District Court, Western District of Washington.

Allowed by:

EDWARD E. CUSHMAN,

United States District Judge.

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington. William Black, Plaintiff, vs. Central Na-

tional Fire Insurance Company, of Chicago, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Citation on Writ of Error [Original].

United States of America,
Western District of Washington,
Southern Division,—ss.

To William Black and Hayden, Langhorne & Metzger, and J. J. Brumbach, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Central National Fire Insurance Company, of Chicago is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Tacoma, in said District, this 3d day of February, in the year of our Lord one thousand nine hundred and fourteen.

[Seal] EDWARD E. CUSHMAN,
Judge,

Due and legal service of the within Citation on writ of errors, by certified copy thereof prepared and certified to as such by Bartlett Cole, as one of the attorneys for the plaintiff in error, is hereby made upon me at Tacoma, Washington, this 3d day of February, 1914.

HAYDEN, LANGHORNE & METZGER,
MAURICE LANGHORNE,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington, Southern Division. William Black, Plaintiff, vs. Central National Fire Insurance Company, of Chicago, Defendant. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 3, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the District Court of the United States for the Western District of Washington, Southern Division.

WILLIAM BLACK,

Plaintiff,

vs.

CENTRAL NATIONAL FIRE INSURANCE COMPANY, OF CHICAGO,

Defendant.

Certificate [of Hon. Edward E. Cushman, U. S. District Judge, as to Rule 58 of U. S. District Court].

United States of America,
State of Washington,
County of Pierce,—ss.

I, E. E. Cushman, a Judge of the District Court of the United States for the Western District of Washington, Southern Division, do hereby certify that there has been adopted and promulgated by the above-entitled court prior to the trial of above cause certain printed rules of practice. That Rule #58 of the above-entitled court is as follows, to wit:

> "Exceptions to a Charge.—Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the Court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same."

~~I further certify that all of defendant's exceptions to instructions given to the jury were taken in open court and noted by the reporter; that all of the defendant's exceptions to the refusal of the Court to~~

~~give its requested instructions were taken in open court and noted by the reporter;~~

~~That at the conclusion of the Court's charge to the jury, the jury was dismissed by the Court before the defendant had an opportunity to take any exceptions to the instructions given, or to the refusal to give the requested instructions.~~

Dated March 30, 1914.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: No. ——. In the District Court of the United States, for the Western District of Washington. William Black, Plaintiff, vs. Central National Fire Insurance Company, of Chicago, Defendant. Certificate. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 30, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.

[Endorsed]: No. 2395. United States Circuit Court of Appeals for the Ninth Circuit. Central National Fire Insurance Company of Chicago, Illinois, a Corporation, Plaintiff in Error, vs. William Black, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Received and filed April 2, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2395

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL NATIONAL FIRE INSURANCE COMPANY, of Chicago, Illinois, a corporation,
Plaintiff in Error,

vs.

WILLIAM BLACK,
Defendant in Error,

BRIEF OF PLAINTIFF IN ERROR.

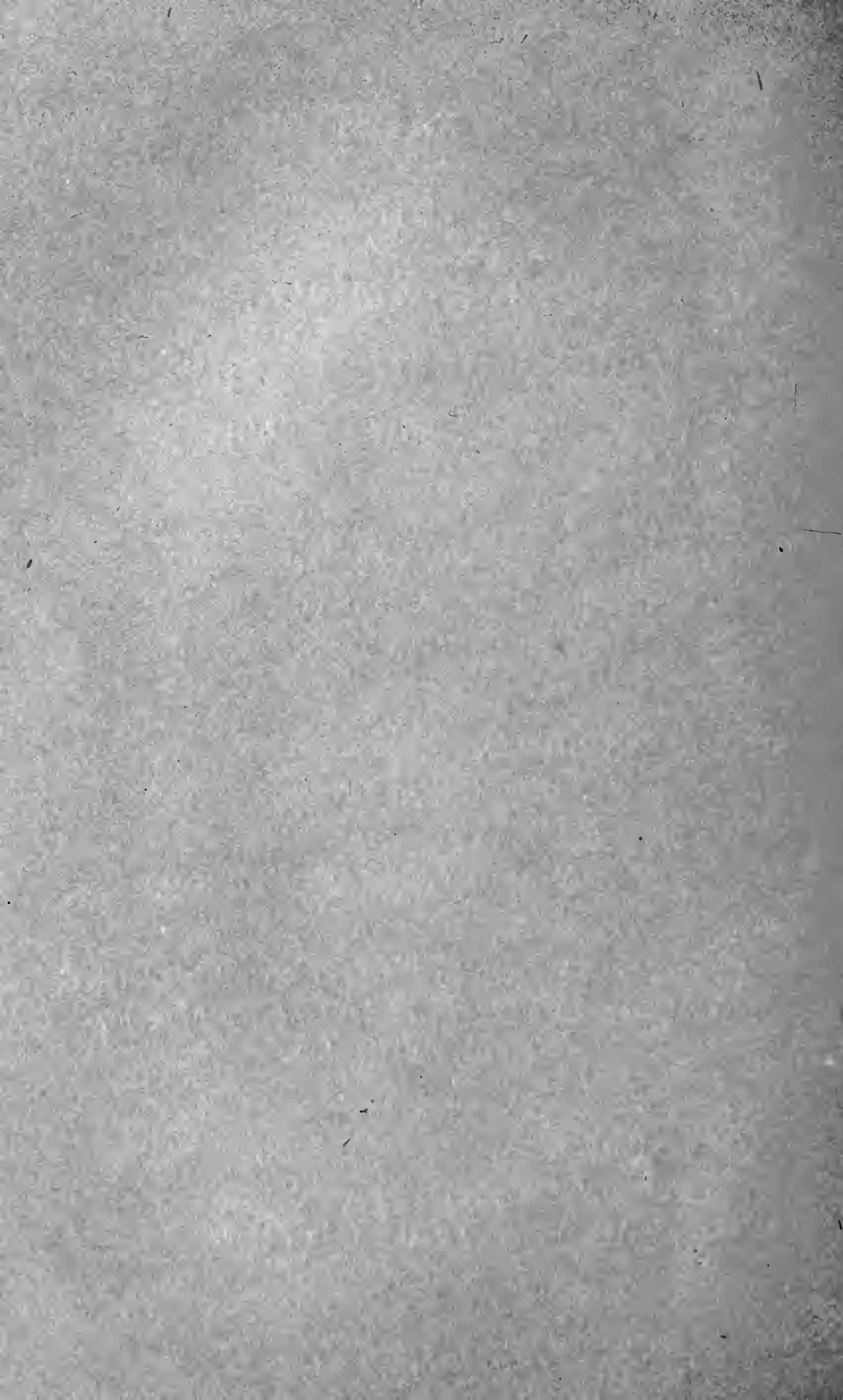
Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

COLE & COLE,
Portland, Ore.
Attorneys for Plaintiff in Error.

Filed

BEACH-THOMAS CO., PRINTERS, 82 FIRST STREET, PORTLAND

AUG 24 1914



No. 2395

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL NATIONAL FIRE INSURANCE COMPANY, of Chicago, Illinois, a corporation,
Plaintiff in Error,
vs.
WILLIAM BLACK,
Defendant in Error,

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

STATEMENT.

This action was commenced in December, 1912, by William Black against the Central National Fire Insurance Company, of Chicago, Illinois, a corporation, in the Superior Court of the State of Washington for Pacific County, and was thereafter, on petition of Plaintiff in Error, removed to the United

States District Court for the Western District of Washington, Southern Division.

The action was brought upon a fire insurance policy, executed and delivered to William Black by Plaintiff in Error on or about the 18th day of June, 1912, and covered a certain stock of liquors, cigars and merchandise kept for sale by William Black in his saloon at Long Beach, Washington. The complaint is as follows:

COMPLAINT.

That plaintiff complains of the defendant above named and alleges:

1. That the defendant is a corporation duly created by and under the laws of the State of Illinois pursuant to an act of the Legislature of said State of Illinois and having its principal office at the city of Chicago in that State.

2. That the plaintiff was the owner of a certain stock of merchandise consisting principally of wines, liquors, cigars, beer and soda and mineral waters kept for sale by him, in the two-story, shingle roof, frame building and adjoining and communicating additions thereto, occupied by plaintiff as a saloon and situated on lot 6, in block 6, of Tinker's north addition to Long Beach, Pacific County, Washington, at the time of its insurance and destruction by fire as hereinafter mentioned.

3. That on the 18th day of June, 1912, at said Long Beach, Washington, in consideration of the payment by the plaintiff to the defendant of the premium of $137.50, the defendant by its agents duly

authorized thereto, made its policy of insurance in writing, a copy of which is annexed hereto, marked Exhibit "A" and by this reference made a part hereof.

4. That on the 27th day of June, 1912, said two-story frame building and the store furniture and fixtures contained therein, together with the plaintiff's above-described stock of merchandise and the goods, wares and merchandise kept for sale by the plaintiff, were totally destroyed by fire.

5. That the plaintiff's loss thereby was Five Thousand Dollars.

6. That on the 23rd day of August, 1912, he, the plaintiff, furnished the defendant with proof of his said loss of said (4) stock of merchandise and otherwise performed all the conditions of said policy on his part.

7. That the defendant has not paid said loss nor any part thereof.

WHEREFORE the plaintiff demands judgment in the sum of Five Thousand Dollars, for his costs in this behalf expended, and such other relief as the Court shall deem appropriate.

The insurance policy contains, among others, the following provisions:

"In consideration of the stipulations herein named and of $137.00 premium, does insure Wm. Black for the term of one year from the 18th day of June, 1912, at noon, to the 18th day of June, 1913, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Dollars, to the following

described property while located and contained as described herein, and not elsewhere, to-wit:

$5000.00 on his stock of merchandise, consisting principally of wines, liquors, cigars, beer, soda and mineral water and all other goods, wares and merchandise not more hazardous kept for sale by assured, while contained in two-story shingle roofed frame building and adjoining and communicating additions thereto, while occupied as saloon and situated on Lot 6, Block 6, Tinker's North Addition to Long Beach, Pacific County, Washington."

The policy contains the following stipulations and conditions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of the like kind and quality; said ascertainment or estimate should be made by the insured and this company, or, if they differ, then by appraisement, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum of which the company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. ....This entire policy shall be void........ in case of any fraud, or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after

a loss.......This policy may be cancelled at any time at the request of the insured, or by the Company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided or become void or cease, the premium having been actually paid, the unearned portion shall be returned upon surrender of this policy of last renewal, this Company retaining the customary short rate, except that when this policy is cancelled by this Company by giving notice, it shall retain only the pro rata premium...........If fire occur, the insured shall give immediate notice of any loss thereby in writing to this Company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and within sixty days after the fire, unless such time be extended in writing by this Company, shall render a statement to this Company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon, and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit

to any person designated by this Company, all that remains of any property herein described, and submit to examinations under oath by any person named by this Company and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this Company, or its representative, and shall permit extracts or copies thereof to be made.

This Company shall not be held to have waived any provisions or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this Company, including an award by appraisers when appraisal has been required.

No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Plaintiff in Error filed its Amended Answer, admitting the execution and delivery of the policy of insurance, but denying plaintiff's loss thereunder was the sum of $5000.00 or any other sum in excess of $1000.00. Defendant's answer also contained three further and separate defenses to plaintiff's complaint.

In defendant's first answer and defense is alleged that on or about the 10th day of September,

1912, and the 9th day of October, 1912, defendant requested and demanded from plaintiff that he produce to this defendant for examination all bills of purchases of stock since his last inventory, or if said bills of purchases had been destroyed then certified copies of the original bills. Defendant also demanded from the plaintiff that he supply and produce to defendant a record of his sales made of stock since the date of his last inventory. This defendant also requested plaintiff on or about said dates to exhibit to this defendant his last authentic inventory taken of his stock, or a certified copy thereof. That plaintiff refused to produce for the examination of this defendant any bills, invoices, or other vouchers of any goods, or certified copies thereof, or any inventory thereof. That all of this defendant's requests and requirements for bills, invoices, vouchers, statements or inventory, or certified copies thereof as above set forth, were refused and denied by plaintiff.

That on the 11th day of October, 1912, plaintiff notified defendant that he would not assist the defendant any further in investigating his said alleged fire loss, and plaintiff then and there stated that as far as he was concerned the matter was then and there ended, and that he would not further perform any of the requirements, agreements, conditions or covenants on his part to be performed under the terms of the policy set forth in plaintiff's complaint.

As a further defense the defendant alleged:

I.

That on or about the 23rd day of August, 1912,

plaintiff furnished and delivered to the defendant an alleged proof of loss in writing, which said alleged proof was subscribed and sworn to by plaintiff before a notary public in and for the State of Washington, residing at Long Beach, Washington.

II.

Plaintiff further alleges that in said alleged proof of loss plaintiff falsely and fraudulently represented to this defendant and set forth that the said plaintiff had on hand in his saloon at the time of said fire, wines, liquors, mineral water and cigars, of the value of $7378.85, which said property plaintiff claimed was covered and insured by said policy. Attached to and forming a part of said alleged proof of loss was a written statement setting forth the value of the items which plaintiff claims were destroyed by said fire, and for which plaintiff claimed the defendant was liable under the terms of said policy. That among the items claimed by plaintiff was an item of five barrels of Old Crow Whiskey, which plaintiff falsely and fraudulently claimed to be of the value of $1000.00. Defendant further alleges that plaintiff did not have on hand the said five barrels of Old Crow Whiskey at the time of said fire, and that five barrels of Old Crow Whiskey would not be of any greater value than the sum of $600.00, all of which the plaintiff well knew. Defendant further alleges that among the items claimed by plaintiff in said alleged proof of loss was an item of four barrels of Cedar Brook McBrayer's Whiskey, which plaintiff claimed were of the value of $800.00. Defendant further alleges that plaintiff did not have on hand at the time of

said fire four barrels of Cedar Brook McBrayer's Whiskey, and that four barrels of Cedar Brook McBrayer's Whiskey at the time of the fire would not have been of any greater value than $300.00, all of which the plaintiff well knew.

Defendant further alleges that among the items claimed by plaintiff in said alleged proof of loss was an item of three barrels of Green River Whiskey, which plaintiff claimed were of the value of $750.00; that plaintiff did not have said property on hand at the time of said fire, that said property was not destroyed by said fire, and that three barrels of Green River Whiskey at the time of said fire would not be of any greater value than $400.00.

That plaintiff's alleged proof of loss contained among other items the following:

3	Barrels Penwick Rye (1904)	$400.00
3	Barrels Penwick Rye (2 not tapped)	400.00
1	Barrel Old Crow Whiskey (s Gallons drawn)	350.00
1	Barrel Fox Mountain Whiskey	400.00
2	Barrels A. G. McBrayer's Whiskey	300.00
1	Barrel Wictlow Whiskey	125.00
1	Barrel California Port Wine	75.00
1½	Barrels Hudson Bay Rum	50.00
2	Barrels Clark Bros.' Whiskey	214.35
1000	Attention Cigars	35.00
900	Y. & B. Cigars	81.00
500	Van Dyke Cigars	45.00
1600	Optimo Cigars	144.00
100	Carabano Cigars	9.00
500	Alhambra Cigars	17.50
500	Gato Cigars	40.00

1½ Barrels Imported Port Wine.......	75.00
1½ Barrels California Brandy..........	40.00

Defendant further alleges that the plaintiff did not have the above mentioned items of merchandise among his stock of goods on hand at the time of the fire; that the above items of merchandise were not destroyed by said fire, and that plaintiff falsely and fraudulently represented to this defendant, for the purpose of defrauding this defendant, that said items of merchandise were among the stock of goods destroyed by said fire and were on hand for the plaintiff.

IV.

Defendant further alleges that plaintiff well knew at the time he delivered to this defendant his alleged proof of loss that the above items of merchandise were not of the value claimed by him, even if they had been on hand and among plaintiff's stock and destroyed by said fire. Defendant further alleges that plaintiff falsely and fraudulently claimed and represented to this defendant that the above items of goods were of values as above mentioned, whereas said items of goods were of great deal less value than the amounts claimed thereon, all of which was well known to the plaintiff. That plaintiff falsely and fraudulently represented to this defendant in said alleged proof of loss that his stock of goods destroyed by said fire was of the reasonable value of $7,378.85, whereas said stock of goods was not of said value and was not at the time of its destruction by fire of any greater value than $1,000.00. That plaintiff claimed in said alleged proof of loss payment for various other items

of liquors which were not on hand or among his stock of goods destroyed, for the purpose of defrauding this defendant. Defendant further alleges that said alleged proof of loss contained items of merchandise not covered by said policy and not within the terms thereof, all of which plaintiff well knew, and that plaintiff made claim for the above mentioned items of goods from this defendant for the purpose of defrauding this defendant, and plaintiff falsely and fraudulently represented to this defendant that they were among the stock of goods destroyed by said fire.

As a further and separate defense defendant alleged:

I.

That on or about the 27th day of June, 1912, the building described in said policy was destroyed by fire, together with whatever stock of liquors, wines and cigars, plaintiff had on hand in said building at the time of said fire, which said fire was caused by the act, design or procurement of the plaintiff, and not otherwise; that by reason thereof said policy is void and of no effect and this defendant is not liable thereunder.

Thereafter Defendant in Error filed his reply to said Amended Answer, which reply is as follows:

I.

Replying to the second paragraph of the first affirmative defense as contained in said answer, the plaintiff alleges and avers the fact to be that he gave to said defendant, its agents and servants, all

information in his possession concerning the amount of loss sustained by him under the policy sued on; that all of the invoices and the inventory of the stock of goods so contained in the building described in said policy of insurance were destroyed by fire, and it was impossible for plaintiff to produce the originals of the invoices and inventory, but said plaintiff did furnish to said defendant, its agents and servants, the names and addresses of all persons, firms and corporations with whom plaintiff had bought goods, so as to enable the said defendant, its agents and attorneys, to ascertain for themselves the extent of plaintiff's loss under said policy. The plaintiff denies that the request of defendant for bills, invoices, vouchers, statements or inventory or certified copies thereof were refused and denied by this plaintiff, but, on the contrary, the plaintiff alleges and avers the fact to be that he did everything within his power to comply with the terms and stipulations contained in said policy of insurance and with the demands and requests made by said defendant, its officers, agents and servants, for information concerning the extent of the plaintiff's said loss.

II.

For reply to the third paragraph of the first affirmative defense, as contained in said answer, the plaintiff denies the same, the whole and every part thereof, and each and every allegation therein contained.

For reply to the second affirmative defense, as contained in said answer, the plaintiff says:

I.

For reply to the second paragraph thereof, he admits that the proof of loss which he furnished to said defendant disclosed that at the time of the fire plaintiff had on hand wines, liquors, mineral water, cigars and other articles of personal property of the value of Seventy-three Hundred Seventy-eight and 85-100 ($7378.85) Dollars; admits that among the items of personal property plaintiff claims was destroyed was five (5) barrels of "Old Crow" whiskey, which plaintiff claimed and verily believes was of the value of the sum of One Thousand ($1000) Dollars, which whiskey the plaintiff avers and alleges that he had on hand at the time of said fire and which was destroyed therein; plaintiff admits that said proof of loss set forth the items of personal property mentioned and described in paragraph two (2) of the second affirmative defense, as contained in said answer, all of which were on hand at the time of said fire and which plaintiff, at the time of making proof of loss, verily believed to be of the value represented by him in his proof of loss so made to the defendant company.

II.

Replying to the third paragraph of said second affirmative defense, plaintiff denies the same, the whole and every part thereof and each and every allegation therein contained.

III.

For reply to the matters and things contained in paragraph four (4) of the second affirmative

defense as contained in the amended answer, plaintiff denies that he made any false representations whatsoever concerning the value of the goods so destroyed by fire which plaintiff claims were covered by said policy of insurance, and denies that he made any false or fraudulent statements as to the items of goods of personal property so destroyed by fire, and he denies that in his proof of loss he falsely and fraudulently or at all made any false representations to the said defendant concerning the stock of goods so destroyed by fire; plaintiff denies that said stock of goods was not of any greater value than One Thousand ($1000) Dollars at the time of its destruction by fire, and alleges the fact to be that it was of the approximate value of Seventy-three Hundred Seventy-eight and 85-100 ($7378.85) Dollars. Plaintiff further alleges and avers the fact to be that the proof of loss so made out and sent to the defendant insurance company was wholly written, made out and constructed by Henry Kayler, the agent of said defendant, at Long Beach, in the State of Washington, and that if said proof of loss contained any items of merchandise or personal property not covered by said insurance, the same was not due to any fault or design on the part of the said plaintiff to in any manner defraud or deceive the said defendant company, but that said plaintiff wholly relied upon the said Henry Kayler, the agent of the said defendent insurance company, to properly make out said proof of loss and to include therein such items of personal property only as was covered by said policy of insurance, and plaitiff avers and alleges the fact to be on information and belief that if the said Kayler, the agent of said defendant, did include in said proof of loss

any items of personal property not covered by said policy of insurance, that the same was done without any design on the part of the said Kayler to defraud said insurance company, and plaintiff further avers and alleges the fact to be that in the making out of said proof of loss the said Kayler was acting for and on behalf of the defendant insurance company and not for and on behalf of this plaintiff.

IV.

For reply to the fifth paragraph of the second affirmative defense as contained in said amended answer, plaintiff admits that the policy of insurance upon which this action is brought provides among other things in case of any fraudulent or false swearing by the insured in the respects set out in said paragraph, that the policy becomes void, but plaintiff avers and alleges the fact to be that he has never been guilty of any false swearing or of any attempt to defraud the said defendant.

For reply to the third affirmative defense as contained in said answer, the plaintiff denied that the fire was caused by his act, procurement or design.

After said cause was at issue Plaintiff in Error propounded forty-two written interrogatories to William Black, pursuant to Section 1226 of Remington & Ballinger's Annotated Codes & Statutes of the State of Washington. Said Interrogatories were filed in the United States District Court upon the 13th day of May, 1913, and on the 2nd day of June, 1913, William Black filed his answers thereto in writing which answers were subscribed and

sworn to before a Notary Public. (See Vol. 1 of transcript, pages 38 to 62.)

At the trial of the cause it was contended by Plaintiff in Error that Black's stock of merchandise, wines, liquors, cigars, etc., was very small and was worth less than the sum of $1000.00; that the policy was void by reason of the failure of Defendant in Error to furnish the Insurance Company with his last authentic inventory and certified copies of his invoices, bills of purchase, etc. That Defendant in Error had been guilty of false and fraudulent swearing in connection with his loss and that the fire originated by the act, procurement or design of the Defendant in Error.

Upon the issues thus made the trial of this cause was begun before the Court on the 21st day of October, 1913, and continued from day to day until the 24th day of October, 1913, when the jury in said cause returned a verdict in favor of William Black and against the Central National Fire Insurance Company for the sum of $5000.00. On the 30th day of October, 1913, a judgment in favor of the plaintiff and against the defendant on said verdict was entered by the Court for the sum of $5000.00 with interest thereon at the rate of 6 per cent per annum from the 6th day of December, 1912, together with costs and disbursements taxed at $210.50.

Thereafter and on the 15th day of November, 1913, and within the time allowed by law and the orders of the Court, the defendant filed its motion for a new trial, which was over-ruled on the 1st day of December, 1913, and on the 8th day of January, 1914, and within the time allowed by law and the orders of the Court, the Plaintiff in Error tendered

to the Court its Bill of Exceptions, and the same was then settled and allowed and made a part of the record in this cause.

On the 27th day of January, 1914, the Insurance Company filed its petition for Writ of Error and therewith its Assignment of Errors, and thereafter a Writ of Error in said cause was duly issued. Plaintiff in Error, upon its Writ of Error, relies upon the following Assignment of Errors:

ASSIGNMENT OF ERRORS.

I.

Said District Court erred in overruling the objections of the defendant to the following question propounded by counsel for plaintiff to the witness, S. A. Madge:

Q. Just tell the jury what kind and character of stock of liquors Mr. Black kept on hand.

To which counsel for the defendant objected on the ground that it was not close enough unless shown to be immediately preceding the fire, which objection was overruled, to which ruling the defendant then and there excepted, which exception was allowed. Said witness having previously testified that he resided at Olympia; had been in the insurance business for about five years; had been deputy collector of internal revenue; had not been in Black's saloon since 1908. (Transcript 470-471.)

II.

Said District Court erred in overruling defendant's motion to strike out the testimony of the wit-

ness, S. A. Madge, to which ruling of the Court defendant excepted, and which exception was then and there allowed; said witness having previously given the following testimony:

I ceased to be deputy collector of internal revenue just about five years ago. I was in his place of business at Long Beach once or twice before I went out of the service. It was about five years ago. I was in his place of business at Ilwaco, also in his place of business after he moved to Long Beach. I visited his place of business in my official capacity as deputy collector of internal revenue. The stock of goods that he carried in Ilwaco, I remember very distinctly. I do not remember so distinctly about the stock of goods at Long Beach after he moved up there, but my impression is that it was the same stock of goods as the saloon in Ilwaco. It was a small town, and I was impressed with the stock of goods that he carried, because it was so far beyond the class of goods that are kept in saloons in towns of that size, that I made an inquiry, I think, and some investigation to find out why he was carrying a stock which was all double stamped goods; double stamped goods are straight distillery goods. He carried a very high grade of liquors, Old Crow, Hermitage, Penwick Rye, and that class of goods. I think he had one barrel that ran up to 120 proof; a very high grade of goods, and he had quite a stock of it. It was in barrels, and the barrels were racked up and the barrels were all tapped. I tested quite a bit of it, because I felt it was my duty to do so on account of the size of the town, but he gave me a very reasonable explanation of why he carried that class of goods in his place.

He had some very old liquors, reimported goods; reimported goods are goods that are taken across the water and brought back here to increase the quality of the liquor. Old Crow, three years old, when it would be put out of bond, would cost in the neighborhood of three to four and a half a gallon, that is the younger age. Six or seven years old, it would be worth seven to ten a gallon. If ten years old it is worth seven, some of it ten. Liquor that is six years old would be worth five or six a gallon. It is a lot owing to the amount of absorption and the amount of liquor lost. Some barrels will char quicker than others and the proof will run up higher; that means there is a loss of quantity in the barrel and a higher proof. Mr. Black's saloon is a higher class of saloon than the general run. He had quite a large supply of liquors. I think he kept a pretty fair supply of cigars, that is my impression. Rectified goods are compounded goods. Certain wholesalers and rectifiers have a license to rectify goods, and they take alcohol and Green River whiskey and mix them together, putting water in and bring the proof down to about sixty or eighty-five, somewhere along there, and put coloring matter in there, and sometimes caramel, to give it a mellow taste. I do not think he had a single bit of rectified goods in his place. I think all of his goods were bottled in bond. They are bottled under Government supervision at the bonded warehouses at the distilleries, and they are bottled at 100 proof and the Government stamp is put over the cork. There is a very heavy penalty for refilling any of these bottles. It is our duty to see that none of these bottles are refilled. These liquors I spoke of were in Mr. Black's saloon in Ilwaco. I was in Mr.

Black's saloon the last time about five years ago. I was in his saloon only once after he moved to Long Beach, that was in 1908.

(Transcript 471-472.)

III.

Said District Court erred in overruling the objection of the defendant to the following question propounded by counsel for plaintiff to the witness, S. A. Madge.

Q. For instance, if a person kept that for several years, supposing he got a barrel of these double stamped goods in 1903, and it cost three or four and a half a gallon, what would be its value six or seven years later?

To which counsel for the defendant objected on the ground that the witness was not qualified to give testimony as to the value of liquor, which objection was overruled, to which ruling the defendant excepted, and the exception was then and there allowed.

(Transcript 473.)

IV.

Said District Court erred in overruling defendant's objection to the following question propounded by counsel for plaintiff to the witness, S. A. Madge.

Q. Do you know what they cost per gallon, barrel, etc.?

A. Well, Old Crow would cost in the neighborhood of three year old, when it would be put out of bond, would cost in the neighborhood of three to four and a half a gallon, that is the younger age.

Counsel for defendant moved that said answer be stricken out for the reason that said witness was not qualified; which motion was denied by the Court, to which ruling the defendant then and there excepted, which exception was allowed.

(Transcript 474.)

V.

Said District Court erred upon the trial of said cause, in permitting counsel for the plaintiff to offer, and in admitting over the objection and exception of the defendant, plaintiff's alleged proof of loss (Plaintiff's Exhibit 3), which was objected to by the defendant for the reason that it contained property not covered by the policy, and on the further ground that it contained a gross and exaggerated value of the property, and was not such a proof of loss as is required by the terms of the policy, which exhibit is as follows:

Wm. Black vs. Central National Fire Insurance Co.

Plaintiff's Exhibit 3.

INVENTORY ATTACHED TO AND BEING PART OF BULK LIQUORS ON HAND, PROOF OF LOSS, UNBROKEN PACKAGES.

5 bbls. Old Crow, Jan. 2, 1906, 1 bbl. tapped, 1 gal. sold.................$1000.00

Item	Value
4 bbls. Cedar Brook McBrayer, 1903, not tapped	800.00
3 bbls. Green River, 1902, untapped	750.00
3 bbls. Penryck, 1904, 2 bbls. not tapped.	400.00
1 bbl. Old Crow, 1899, 2 gals. drawn	350.00
1 bbl. Fox Mountain, 1896, not tapped.	400.00
2 bbls. A. G. McBrayer's single stamp, 1 bbl. not tapped	300.00
1 bbl. Wicklow	125.00
1 bbl. California Port Wine	75.00
1½ bbls. Imported Port Wine, 16 gall.	75.00
1½ bbls. California Brandy, 16 gall.	40.00
1½ bbls. Rum, Hudson Bay	50.00
4 gall. Gin Box. jug	9.00
5 cases Whiskey, flasks	20.00
2 bbls. Clark Bros.' Whiskey, untapped.	214.35
1000 Attention Cigars	35.00
500 Alhambra Cigars	17.00
5 bbls. Bottled Beer	47.50
900 Y. & B. Cigars	81.00
800 El Rayo	72.00
500 Gato	45.00
1600 Optimos	144.00
500 Van Dyke	45.00
100 Carabana	9.00
100 Loveras	9.00
200 Carletons	12.00
200 Eschelles	12.00
800 Manila	40.00
7 Boxes Egyptian Cigarettes	7.00
1 box Egyptian Luxury Cigarettes	2.50
1 box Pall Mall Imported	2.50
	$5,189.35

5 cases Joe Gideon Whiskey.............$	62.50
15 cases Joel B. Frazier, 8 bottles in show case	180.00
22 cases Roxbury Rye, 7 bottles in show case	220.00
4 cases Guggenheimer, 5 bottles in show case	40.00
4 cases Old Crow Bourbon, 9 bottles in show case	50.00
4 cases Hermitage, 6 bottles in show case	50.00
4 cases Gibson Rye, 3 bottles in show case	40.00
2 cases Pebble Ford, 8 bottles in show case	25.00
2 cases McBrayer, 9 bottles in show case.	27.00
1 case Cyrus Noble, 4 bottles in show case	14.00
3 cases Atherton, 9 bottles in show case..	40.00
4 cases W. H. Lacey....................	40.00
2 cases Yellowstone	25.00
2 cases Holland Gin, Imp., 14 bottles in show case	45.00
2 cases Gordon, 9 bottles in show case....	30.00
2 cases Martelle Brandy, 6 bottles in show case	40.00
2 cases J. Hennesy, 9 bottles in show case	36.00
4 cases Sazarae, 3 bottles in show case..	50.00
2 cases Scotch Whiskey, 10 bottles in show case	30.00
1 case Old Curio	20.00
4 cases Sloe Gin	40.00
1 case Jamaica Rum	14.00
2 cases Canadian Club Whiskey, 7 bottles in show case	17.50
1 case Mountain Dew Scotch...........	14.00
3 cases Italian Vermouth	24.00
1 case French	9.00

2 cases Maraschino Cherries	12.00
2 cases Rock & Rye	14.00
2 cases Pineapple Rock & Rye...........	20.00
	$1,166.50

1 case Benedictine, Imp..................	$ 35.00
6 bottles Creme de Menthe, Imp..........	12.00
6 bottles Creme de Cocoa................	12.00
1 bottle Picon	2.00
2 bottles Boonekamp Bitters	2.00
2 cases Claret Wine	9.00
2 cases Muscat	9.00
2 cases Angelica	9.00
2 cases Madeira	9.00
2 cases Sherry	9.00
2 cases Tokay	9.00
4 cases Cresta Blanca-Margam	36.00
2 cases Sparkling Burgundy, pts..........	26.00
2 cases Sparkling Burgundy, qts..........	26.00
3 cases Mont Rouge-Sauterne.............	30.00
2 cases Mont Rouge-Burgundy............	24.00
6 dozen Beer Glasses	12.00
2 dozen Water Glasses	2.75
5 dozen Whiskey Glasses	8.00
2 sets Measures, Copper	12.00
2 sets Funnels	12.00
8 dozen Bar and Glass Towels...........	24.00
8 dozen Decanters	8.00
25 gross Corks, all sizes................	4.00
	$353.75

4 dozen 1 gal. Demijohns................	$ 20.00
5 dozen ½ gal. Demijohns...............	15.00
2 dozen Champagne Glasses	4.00
2 dozen Port Wine	3.00
2 dozen Brandy	3.00
2 dozen Cocktail	3.00
2 dozen Vermouth	3.00
2 dozen Benedictine	3.00
3 cases Sauterne Van Schuyver.........	13.50
2 cases Old Tom Gin, J. W. Nicholson, Imp.	22.50
2 cases Lash Bitters	16.00
1 case Ginger Brandy	8.00
2 cases Virginia Dare Wine.............	12.00
1 case Lyon's Cocktails	12.00
1 case Mumm's Champagne	37.00
1 can Alcohol, 4¾ gall	12.00
2 cases Damiana Bitters.................	16.00
1 drum Bass's Ale, Imported............	16.00
1 case Stout, Imported	14.00
2 bbls. Budweiser Beer, qts..............	25.00
28 bottles Lock Wine	11.00
1 qt. Jamaica Ginger	1.50
1 qt. Essence Peppermint	1.50
2 cases White Rock Mineral Water......	17.00
1 case Bartlett Mineral Water..........	8.50
1 bbl. Soda Water	8.50
1 bbl. Ginger Ale	8.50
5 bbls. Weinhard Bottled Beer	45.00
2 cases Grape Juice, large size..........	9.00
	$320.50

1 bbl. Mellwood Whiskey, about 15 gall...	$ 37.50
1 keg Mellwood Whiskey, about 3 gall....	7.50

1	keg Old Crow Whiskey, about 2½ gall..	6.25
20	bottles various liquors on back bar.....	25.00
126	bottles in show cases, aver. $1.25 per bottle	157.50
6	broken boxes cigars, about 300, aver. $75 per M.	22.50
	Cordials, Mineral Waters, Soda Waters, Beer and Ales in back bar..............	30.00
20	gall. Blackberry Brandy................	50.00
1	gall. Dry Sherry, $1.25 per gall.........	12.50
		$348.75

For further information in regard to value of the different whiskey would refer you to the Internal Revenue offices at Tacoma, also Mr. Locke, of the firm of Greenbaum Bros., Louisville, Kentucky, residing at 1130 Hawthorne Ave., Portland, Julius Friedman, of Blumauer & Hock, and Mr. Adams, of Fleckenstein & Son, Frank Botsfuhe (?), and Julius Wellman, of Brown, Forman & Co. As to cigars, I bought of Mason, Ehrman & Co., Gunst & Co., Hart Cigar Co., Taylor, of Astoria, representing Sohbacker & Co. If necessary, will furnish sworn affidavits from above people and other prominent persons, who are familiar with my stock, as I wish you to understand that I desire the fullest investigation. That I have nothing to conceal and can substantiate everything that is stated in above inventory.

Remaining

Yours respectfully,

Wm. Black.

No. of Policy, 590757. Amount of Policy, $5000.00.

PROOF OF LOSS
to the
Central National Fire Insurance Company of Chicago, Ill.

BY YOUR POLICY OF INSURANCE NUMBERED 590757, issued at your Agency at Long Beach, Wash., commencing at 12 o'clock noon, on the 17th day of June, 1912, and terminating at 12 o'clock noon, on the 17th day of June, 1913, you insured Wm. Black against loss and damage by fire to the amount of Five Thousand Dollars, according to the terms and conditions of said Policy, the written portion thereof, together with an exact copy of all endorsements, assignments and transfers, being as follows, viz.:

MERCHANDISE FORM.

$5000.00 on his stock of merchandise, consisting principally of wines, liquors, soda and mineral waters, beer and cigars and all other goods, wares and merchandise not more hazardous, kept for sale by assured, while contained in two-story shingle roofed frame building, and adjoining and communicating additions thereto, while occupied as saloon, and situate Lot 6, Blk. 6, Tinker's north addition to Long Beach, Pacific County, Wash.

$.........on store furniture and fixtures while contained in said building.

$.........other concurrent insurance permitted.

POWDER AND KEROSENE.—Permission granted to keep for sale not to exceed fifty pounds

of gunpowder and five barrels of kerosene oil, the latter to be of not less than the United States standard of 110 degrees, neither to be handled or sold by artificial light.

ELECTRIC LIGHTS.—Permission for electric lights, it being agreed that wires shall be doubly coated with approved insulating material, and protected where they enter buildings, by porcelain or hard rubber insulators, and shall also have fusible cut-offs.

LIGHTNING CLAUSE.—This policy shall cover any direct loss or damage caused by lightning, (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; PROVIDED, however, if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not; and provided further, that if dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this company shall not be liable for any loss or damage to such property resulting from any electrical injury or disturbance, whether from artificial or natural causes, unless fire ensues, and then for the loss by fire only.

Attached to and forming a part of Policy No. 590757 of the CENTRAL NATIONAL FIRE INSURANCE CO. OF CHICAGO, ILLINOIS.

HENRY KAYLER, Agent.

Loss, if any, payable to Wm. Black.

The total insurance on said property, or any part thereof, at the time of the fire, including this policy, was five thousand dollars.

A fire occurred on the 27th day of June, A. D. 1912, at about the hour of 1:30 o'clock, A. M. by which the property insured was destroyed, or damaged, as herein set forth, and which originated as follows: Cause unknown.

THE CASH VALUE of each specified subject insured at the time of the fire and the actual loss and damage thereon by said fire as ascertained by appraisal, or by mutual agreement, and the whole amount of insurance thereon were as follows:

1st Item of Policy. Sound value, $8000.00. Total loss, $8000.00. Total Insurance, $5000.00. Total Claim Under Insurance, $5000.00. Claimed of this Insurance Company, $5000.00.

And the insured claim of the above-named Company, by reason of said loss, damage, and Policy of Insurance, the sum of five thousand dollars, in full of their proportion of said loss.

The property insured belonged exclusively to Wm. Black.

If the loss is on building, state whether Real Estate is owned in fee simple or held on lease. Fee simple.

State the nature and amount of incumbrance at the time of the fire. None.

The total value of property saved is $. None as per statement attached hereto, marked Schedule —.

The building insured, or containing said proper-

ty, was occupied in its several parts by the parties hereinafter named and for the following purposes, to-wit: William Black, saloon, and for no other purpose whatever.

The said fire did not originate by any act, design, or procurement on part of assured, nor on the part of any one having any interest in the property insured, or in the said Policy of Insurance; nor in consequence of any fraud or evil practice done or suffered by said assured, that nothing has been done by or with the privity or consent of assured to violate the conditions of the Policy, or to render it void; and then no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and in the possession of the said insured at the time of the said fire; that no property saved has been in any manner concealed, and that no attempt to deceive the said Company as to the extent of said loss or otherwise, has in any manner been made. Any other information that may be required will be furnished on call, and considered a portion of these proofs.

It is furthermore understood and agreed that all bills, invoices, schedules and statements made by the assured, and attached to this Proof of Loss, are to be incorporated into this proof, and are hereby duly sworn to and made a part thereof.

The furnishing of this blank to assured, or making up proofs by Adjuster for Company, is not to be considered as a waiver of any rights of the Company.

WITNESS my hand at Long Beach, Wash., this 22nd day of August, 1912.

WILLIAM BLACK.

Personally appeared Wm. Black, signer of the foregoing statement who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of before me this 22nd day of August, 1912.

HENRY KAYLER,

Notary Public in and for the State of Washington, Residing at Long Beach, Wash.

(Transcript 474-483.)

VI.

Said District Court erred upon the trial of said cause in overruling defendant's motion to strike out the following answers given by the witness, Don H. Dickinson:

Q. Do you know the amount and value of the liquors that Black had there?

A. No, sir, I don't the exact amount; I know it is way up in the thousands.

Defendant moved the Court that said answer be stricken out as it was not shown that said witness was competent to testify, and for the reason that said answer was not responsive to the question, which motion the Court denied, and to this ruling of the Court the defendant then and there excepted, which exception was allowed.

(Transcript 484.)

VII.

Said District Court erred in overruling the objection of counsel for defendant to the following question propounded by counsel for plaintiff to the witness, William Black:

Q. What was the market value of the goods lost by you in this fire of June 27, 1912?

To which counsel for the defendant objected upon the ground that it was not shown that the witness was qualified or familiar with the market value of said property; which objection was overruled, to which ruling defendant then and there excepted; which exception was allowed.

(Transcript 484.)

VIII.

Said District Court erred upon the trial of above entitled cause in denying the motion of counsel for defendant to strike out the testimony of the witness, W. A. Hagermeyer, to which ruling of the Court the defendant then and there excepted, which exception was allowed. Said witness having previously testied as follows: I reside in Tacoma. Am in the retail liquor business. I have bought and sold liquors about three years. Am acquainted with the brand of whiskey known as "Old Crow," also with the brand known as "Penwick Rye." Am also acquainted with the brand known as "Cedar Brook McBrayer's." The fair market value per gallon of the whiskey known as "Old Crow" brand of the 1906 vintage, double stamp, I should judge ought to be five or six dollars

per gallon. I should judge the fair market value of the Cedar Brook McBrayer's 1903 vintage, double stamp, should be about six dollars, somewheres along in there, and the Green River double stamp 1902 vintage, ten and twelve years old, not less than seven dollars. I have some goods that were not bought by myself, but bought by my predecessor, wines and so on, that are over twelve years old. I still have parts of them on hand. The prices which I gave are prices where liquor is sold by the gallon out of a retail store. I am not in the wholesale liquor business. I don't know anything about the wholesale value of these liquors during June, 1912. I do not know what wholesalers have to pay for their goods. I do not think that these prices which I mention would include the retailer's profit. I hardly think there would be any profit in selling at that price. I bought some of this kind of whiskey in 1912. I do not remember what my partner paid for them. I didn't myself, personally, buy any of these ages that have been mentioned. If a man was to buy a barrel of any of these different brands and ages of liquors mentioned in 1912 he would have to pay somewhere near I think those prices. That would be to buy by the barrel. The only way I bought any of these ages was in partnership. My partner did the buying and I paid the bills. I think my partner bought some Old Crow of the year 1906. As near as I can remember he paid about five dollars per gallon, from five to six and a half. He bought it in 1912 in San Francisco. I think in June of 1912.

(Transcript 484-486.)

IX.

Said District Court erred upon the trial of said cause in refusing to sustain the motion of the defendant for judgment of nonsuit made at the close of plaintiff's testimony on the ground that the plaintiff refused to furnish the defendant with copies of his purchases and invoices and on account of his refusal ot perform any of the other terms or conditions on his part to be performed, and for the further reason that the market value of the property had not been shown, which motion was denied by the Court; to which ruling of the Court the defendant excepted, and the exception was then and there allowed.

(Transcript 486.)

X.

Said District Court erred upon the trial of the above cause in denying the motion of counsel for the defendant that the court direct a verdict in favor of the defendant, for the reason that the testimony conclusively showed that the plaintiff had been guilty of false swearing in violation of the terms of the policy, and especially in connection with his alleged proof of loss; which motion was denied by the Court, to which ruling defendant then and there excepted, which exception was allowed.

(Transcript 486-487.)

XI.

Said District Court erred in giving and entering a judgment in favor of the plaintiff and against the defendant for the sum of five thousand dollars, with interest thereon at the rate of six per cent. per annum from the sixth day of December, 1912.

(Transcript 487.)

XII.

Said District Court erred in giving and entering a judgment in favor of the plaintiff and against the defendant for interest on $5000.00 at six per cent. per annum from December 6, 1912.

(Transcript 487.)

XIII.

Said District Court erred in denying the motion of defendant to set aside the verdict and judgment, and to grant a new trial.

(Transcript 487.)

XIV.

Said District Court erred in refusing to instruct the jury as requested by defendant as follows:

The insurance policy in this case provides that the entire policy shall be void if the insured shall be

guilty of any fraudulent or false swearing touching any matter relating to the insurance or the subject thereof, whether before or after loss. If you find from the evidence that the plaintiff in this case has wilfully, or carelessly, made claim for loss exceeding the true market value of the property destroyed, or wilfully or carelessly made claim for property not destroyed in the fire and made affidavit to the same, then in that event he cannot recover in this action. False swearing consists of stating a fact as true which the party does not know to be true. If the plaintiff has inserted in his sworn proof of loss any articles as burned which were not burned and knowingly puts such false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover.

(Transcript 487-488.)

XV.

Said District Court erred in refusing to instruct the jury as requested by defendant as follows:

It appears from the evidence in this case that the plaintiff on or about the 25th day of August, 1913, submitted to the defendant a sworn proof of loss, wherein the plaintiff claimed that the value of the property destroyed in the fire and covered by the policy amounted to the sum of $7378.87.

If you find from the evidence that the plaintiff knew the property destroyed in the fire was of substantially less than the amount, or that he could, by the exercise of reasonable diligence, have known

that said property was of substantially less value, he cannot recover in this action, even though the actual market value of the property exceeds the sum of five thousand dollars.

(Transcript 488.)

XVI.

Said District Court erred in refusing to instruct the jury as requested by defendant as follows:

If you find from the evidence that the plaintiff in his sworn proof of loss, placed an excessive valuation on the whole property burned, or on single portions or quantities thereof, and that such excessive claim was wilfully or carelessly made, then your verdict should be for the defendant.

(Transcript 488.)

XVII.

Said District Court erred in refusing to instruct the jury as requested by defendant, as follows:

The jury is instructed that there is no evidence as to the market value of the case goods and therefor they must be eliminated from the case.

(Transcript 489.)

XVIII.

Said District Court erred in instructing the jury, over the exception and objection of the defendant as follows:

It is provided by the statute of the State of Washington (Sec. 105, Laws of 1911, p. 243), as follows:

Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interests therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurable value of the building or property or interest therein at the time such insurance is affected. Under this provision of the law I charge you that the defendant insurance company presumed to know at the time it issued this policy of insurance in the sum of $5000.00 covering the property described in said policy; and situated in the buildings described in said policy, the value of said property. If it now claims otherwise the burden of proof rests with the defendant to so show by a fair preponderance of the evidence.

(Transcript 489-490.)

XIX.

Said District Court erred in failing to instruct the jury that if the property described in plaintiff's complaint and in the policy of insurance was destroyed by the act, procurement or design of the

plaintiff, they should return a verdict in favor of the defendant.

(Transcript 490.)

POINTS AND AUTHORITIES.

"ACTUAL CASH VALUE" WITHIN THE MEANING OF THE POLICY AND AS APPLICABLE TO WHISKEY, WAS THE MARKET VALUE IN THE WHOLESALE LIQUOR MARKET AT THE TIME THE WHISKEY WAS DESTROYED.

Frick v. United Fireman's Insurance Co., 218 Pa. 409.

Fisher v. Crescent Insurance Co., 33 Fed. 544.

State Mutual Fire Insurance Co. v. Cathey, 153 SW. 935 (Tex).

Mitchell v. St. Paul German Fire Insurance Co., 92 Mich. 594.

Mechanics Fire Insurance Co. v. C. A. Hoover Distilling Co., 182 Fed. 590.

IN AN ACTION TO RECOVER FOR LOSS OF PERSONAL PROPERTY UNDER A FIRE INSURANCE POLICY, INTRINSIC VALUE CANNOT BE SHOWN, UNLESS IT IS FIRST SHOWN THAT THE PROPERTY DESTROYED HAD NO MARKET VALUE.

Eddy v. Lafayette, 49 Fed. Rep. 809.

State Mutual Fire Insurance Co. v. Cathey, supra.

IN CASE THERE IS NO LOCAL MARKET VALUE, THE VALUE IS PROPERLY FIXED BY THE VALUE AT THE NEAREST MARKET, DEDUCTING THE COST OF TRANSPORTATION.

Eddy v. Lafayette, supra.

IN AN ACTION ON AN INSURANCE POLICY THE VALUE OF A STOCK OF GOODS MAY BE ESTABLISHED BY EXPERT EVIDENCE. AS IN OTHER CASES THE WITNESS MUST SHOW HIMSELF COMPETENT TO GIVE HIS OPINION AS AN EXPERT.

Ellicott on Evidence, Vol. 3, Sec. 2320.

Thompson on Trial, Vol. 1, Sec. 380.

Ellicott on Evidence, Vol. 2, Sec. 1034.

FAILURE TO PRODUCE BILLS, INVOICES, INVENTORIES OR OTHER PAPERS TO SUBSTANTIATE A CLAIM FOR LOSS AS REQUIRED BY THE POLICY IS A BREACH OF CONDITIONS SUBSEQUENT AND RENDERS THE POLICY VOID.

Ward v. Central Fire Insurance Co., 38 Pac. 1127 (Wn.).

Mutual Fire Insurance Co. v. Pickett, 117 Md. 638.

Farmers Fire Insurance Co. v. Mispelhorn, 50 Md. 180.

Mispelhorn v. Farmers Fire Insurance Co., 53 Md. 473.

Linscott v. Orient Insurance Co., 88 Me. 497.

Atherton v. British American Insurance Co., 91 Me. 289.

Leach v. Republic Fire Insurance Co., 58 N. H. 245.

Gross v. St. Paul Fire & Marine Insurance Co., 22 Fed. 74.

Seattle Merchants Association v. Germania Fire Insurance Co., 116 Pac. 585.

WHERE THE INSURED HAS BEEN GUILTY OF FRAUD OR FALSE SWEARING IN CONNECTION WITH HIS PROOF OF LOSS, THE POLICY BECOMES VOID AND NO ACTION CAN BE MAINTAINED THEREON.

Pottle v. London & Liverpool & Globe Ins. Co., 85 Atla. 1058 (Me.).

Atherton v. British America Insurance Co., supra.

Linscott v. Orient Insurance Co., supra.

Leach v. Republic Fire Insurance Co., supra.

IF THE INSURED MAKES STATEMENTS UNDER OATH STATING A FACT AS TRUE WHICH HE DOES NOT KNOW TO BE TRUE, OR WHICH HE HAS NO REASONABLE GROUND TO BELIEVE TO BE TRUE, OR WHICH ARE CARELESSLY AND NEGLIGENTLY MADE, THIS RENDERS THE POLICY VOID THE SAME AS FALSE STATEMENTS THAT ARE WILFULLY MADE.

Claffin v. Commonwealth Insurance Co., 110 U. S. 81.

Pottle v. London & Liverpool & Globe Insurance Co., supra.

Linscott v. Orient Insurance Co., supra.

Atherton v. British America Insurance Co., supra.

Leach v. Republic Fire Insurance Co., supra.

Herzog v. Palatine Insurance Co., 79 Pac. 287 (Wn.).

EVEN THOUGH THE AMOUNT OF THE ACTUAL LOSS EXCEEDS THE AMOUNT OF THE POLICY, FRAUD OR FALSE SWEARING WILL VITIATE THE POLICY AND PREVENT RECOVERY THEREON.

Fowler v. Phoenix Insurance Co., 57 Pac. 421 (Ore.).

Doloff v. Phoenix Insurance Co., 82 Me. 266, 19 Atla. 396.

Claffin v. Commonwealth Insurance Co., 110 U. S. 81.

THE INSURANCE POLICY PROVIDES THAT IF THE POLICY SHALL BECOME VOID, THE UNEARNED PREMIUM WILL BE RETURNED UPON THE SURRENDER OF THE POLICY. WITH SUCH A CONDITION IN THE POLICY IT IS NOT NECESSARY THAT THE INSURER SHALL TENDER BACK THE PREMIUM IN ORDER TO AVAIL ITSELF OF THE DEFENSE OF FALSE SWEARING OR FAILURE TO FURNISH INVOICES.

Schwarzchild & Sulzberger v. Phoenix Insursurance Co., 124 Fed. 52.

El Paso Reduction Company v. Hartford Fire Insurance Co., 121 Fed. 937.

Schwarzchild & Sulzberger v. Phoenix Insurance Co., 115 Fed. 653.

Straker v. Phoenix Insurance Co., 101 Wis. 413. 77 NW. 752.

Norris v. Hartford Insurance Co. (S. C.) 33 SE. 566. 74 Amer. State Reports 765.

Phoenix Mutual Insurance Co. v. Brecheisen, 50 Ohio 542. 35 NE. 53.

ARGUMENT.

(1) TESTIMONY REGARDING THE VALUE OR QUALITY OF A STOCK OF MERCHANDISE SHOULD BE CONFINED TO A REASONABLE PERIOD PRIOR TO THE DATE OF THE FIRE, AND TESTIMONY OF THIS KIND CANNOT BE GIVEN BY A WITNESS WHO HAS NOT SEEN THE STOCK FOR FOUR YEARS PRIOR TO THE FIRE, AND SUCH TESTIMONY DOES NOT TEND TO PROVE THE AMOUNT OR VALUE OF THE GOODS ON HAND AT THE TIME OF THE FIRE.

Mr. Elliott in his work on Evidence, Vol. 3, Section 2320, says:

"But it was held incompetent for a witness to give his opinion as to the value of the stock where he had not seen the stock recently before the fire and was unable to state definitely the time of seeing the stock with reference to the time it was destroyed."

S. A. Madge, the first witness called by the plaintiff, should not have been allowed to testify as to the character or amount of liqours which Mr. Black had on hand, as he stated that he had not seen the same since 1908. Such testimony is too remote from the time of fire to be of any value in establishing the amount of loss, and if the insured desired to defraud the insurance company, he might be able to produce such testimony in great abundance, even though he had no stock of goods in his store for some time prior to the fire.

Sales of stock from a retail store are being made

from day to day and the amount of stock on hand four years prior to the fire has no connection whatever with the amount of loss.

Assignment of Error No. 1.

(2) BEFORE A WITNESS CAN TESTIFY AS TO THE MARKET VALUE OF PERSONAL PROPERTY IN AN ACTION TO RECOVER LOSS UNDER A FIRE INSURANCE POLICY, HE MUST FIRST SHOW THAT HE IS FAMILIAR WITH WHAT THE MARKET VALUE OF THE PROPERTY WAS AT THE TIME OF THE FIRE.

Mr. Thompson in his work on Trials, Vol. 1, Sec. 280, says:

"An exception to the rule which excludes the conclusion of witnesses is found in another rule which admits their opinion as to the value, provided a foundation is first laid showing that the witness is acquainted with the value of the thing, the value of which is in dispute, and is therefore competent to give an opinion upon the subject."

It is necessary, before asking the witness to state the value of certain personal property at a certain time, to first show that he has information about the particular kind of personal property asked about and what it was selling for in the market at the time during which he is asked to state its value.

In Ellicott on Evidence, Vol. 3, Sec. 2320, we find the following:

"It is well settled in cases on insurance policies that the value of a stock of goods may be established by expert evidence. As in other cases, the witness must show himself competent to give his opinion as an expert, and the weight of the opinion is for the jury."

The witnesses S. A. Madge, Don H. Dickinson, W. A. Hagermayer and plaintiff, William Black, all testified as to the value of the stock, over the objection and exception of the insurance company, without having shown that they were in any way familiar with such personal property, or in any way competent to give testimony as to the value of the personal property alleged to have been destroyed in the fire. Black testified on cross examination that he knew nothing of the market value of his different barrels of liquor at the time of the fire in June, 1912.

(Transcript 197.)

Assignments of Error 3, 4, 6, 7 and 8.

(3) THE PROOF OF LOSS MUST BE SUCH AS TO SUBSTANTIALLY COMPLY WITH THE TERMS OF THE POLICY.

The insurance policy in this case provides that if fire occur the insured shall forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and shall render a statement within sixty days, signed

and sworn to by the insured, stating among other things, the cash value of each item thereof and the amount of loss thereon.

The proof of loss tendered by Black to the Insurance Company contained no statement as to the cost of the different articles, contained goods not items of stock or kept for sale, and did not contain a true and correct statement of the cash value, but stated a gross and exaggerated value of the items alleged to have been destroyed, and did not therefore comply with the terms of the policy.

Assignment of Error No. 5.

(4) WHERE A STOCK OF LIQUORS IS DESTROYED BY FIRE UNDER THE TERMS OF A POLICY LIKE THE ONE IN THE PRESENT CASE, THE MEASURE OF DAMAGES IS THE VALUE OF SUCH LIQUORS IN THE WHOLESALE MARKET.

The Court refused to strike out the testimony of the witness, W. A. Hagermeyer, who testified as to the retail value of the different brands of liquor. Said witness stated that he did not know anything about the wholesale value of the different liquors during June, 1912, the date of the fire.

As stated by the Court in the case of *Frick v. United Firemen's Insurance Company,* 218 Pa. 409, the actual cash value within the meaning of the policy and as applicable to whiskey, was the market value in the wholesale liquor market at the time the whiskey was destroyed.

The case of *Mitchell v. St. Paul German Fire Insurance Company,* 92 Mich. 594, was an action to recover on a policy of insurance for loss and damage to lumber owned by the plaintiff at the time of the fire, and the Court held that the measure of damages was the market value of such lumber at the time of the fire and not the cost of manufacturing the same, although the plaintiff had a mill and standing timber.

In the case of *Fisher v. Crescent Insurance Company,* 33 Fed. Rep. 544, the Court instructed the jury to find from the evidence what was the market value at the time of the fire; that whiskey was a commodity that has a market value in the wholesale trade, dependent usually upon condition of supply and demand; that plaintiff resided near a railway and the markets of the country were convenient to him, and he had an opportunity of purchasing at market prices whiskey equal in quality to the article destroyed.

The witness Hagermeyer testified that he had not bought any of the whiskies of the ages mentioned personally; that he knew nothing of the wholesale value of the liquors about which he was testifying.

The motion of the Insurance Company to strike out his testimony therefore should have been sustained, as such testimony was incompetent.

Assignment of Error No. 8.

(5) REFUSAL OF THE INSURED TO SUBMIT TO EXAMINATION UNDER OATH, PRODUCE FOR EXAMINATION HIS BOOKS OF ACCOUNT, BILLS, INVOICES, OR OTHER VOUCHERS, OR CERTIFIED COPIES THEREOF, IF ORIGINALS BE LOST, OR TO PERFORM ANY OF THE OTHER CONDITIONS OF THE POLICY ON HIS PART TO BE PERFORMED, RENDERS THE POLICY VOID AND NO ACTION CAN BE MAINTAINED THEREON.

Fire occurred on the 27th day of June, 1912, and on August 19, 1912, the insured wrote to Adjuster, W. G. Lloyd, the following letter:

Long Beach, Wash., Aug. 19th, 1912.

Mr. W. G. Lloyd,
Portland, Ore.

Dear Sir:

I have been waiting since June 27th for you to come down and inspect the site of my building that was burnt on that date. I wish to clear up the rubbish from place but do not want to touch anything till you have seen it. Mr. Whalley of the New Hampshire Ins. Co. refers me to you, hence this letter.

I wish you would make it a point to come as soon as possible.

Yours respect'y,

WM. BLACK.

(Transcript Vol. 2, p. 460.)

Thereafter and in answer to said letter, W. G. Lloyd, Adjuster, whote to Black as follows:

August 20th, 1912.

Mr. Wm. Black,

Long Beach, Wash.

Dear Sir:

I have your letter of August 19th, relative to purported claim by reason of fire and in reply I beg to advise you as follows:

If you have a claim under Pol. No. 590757, issued to you by the Central National Fire Ins. Co. of Chicago, Ill., and Pol. No. 2661130, issued to you by the New Hampshire Fire Ins. Co. of Manchester, N. H., both of which Companies I represent, and on behalf of said Companies I desire to call your attention to the terms and conditions as set forth in lines from 67 to 112 inclusive.

You are hereby required to submit proofs of loss as set forth and in accordance with instructions thereby given in said policies, within sixty days of the fire.

Upon above compliances, I will give the matter attention.

The said Insurance Companies, above referred to, hereby neither admit nor deny liability.

Very Truly Yours.

(Transcript Vol. 2, p. 465.)

Thereafter and on the 23rd day of August, 1912,

Black sent to Mr. Lloyd the purported proofs of loss, with the following letter:

WM. BLACK,
LONG BEACH, WASH.

Long Beach, Wash., Aug. 23, 1912.

Mr. Lloyd,
Portland, Ore.

Dear Sir:

Enclosed please find Proofs of Loss as requested.

Yours respect'y,

WM. BLACK.

(Transcript Vol. 2, p. 459.)

Thereafter and on the 31st day of August, 1912, W. G. Lloyd, Adjuster, acknowledged receipt of said purported proofs of loss by the following letter:

September 10th, 1912.

Mr. Wm. Black,
Long Beach, Wash.

Dear Sir:

We are in receipt of your favor of August 23rd, enclosing papers purporting to be proofs of loss under policy No. 590757, issued to you by the Central National Fire Insurance Company, making claim for loss by fire alleged to have occurred on June 27th, 1912.

The said papers cannot be accepted as satisfactory for the following among other reasons which may subsequently be made to appear.

The list of articles innumerated is only a memorized list and also contains articles which are not items of stock.

The amount set forth in said list as representing the value, are grossly in excess of the true sound value of said articles, alleged to have been destroyed.

Under the terms and conditions of your policy you are required to exhibit the last authentic inventory taken of your stock or a certified copy thereof. You will also supply bills of purchases of stock since the last said inventory, or if said bills of purchases have been destroyed, then certified copies of the original bills.

You also are required to supply a record of your sales made of stock since the date of inventory above referred to.

The said papers cannot therefore be accepted as satisfactory and are held subject to your order.

This company hereby neither admits nor denies any liabilities to you.

Very Truly Yours,

(Transcript Vol. 2, p. 463 & 464.)

Thereafter and on September 12, 1912, Black wrote to the Adjuster as follows:

WM. BLACK,
LONG BEACH, WASH.

Sept. 12th, 1912.

Mr. W. G. Lloyd,
Adjuster Fire Losses,
Portland, Or.

Dear Sir:

Your letters of Sept. 10th have been referred to my lawyers.

Yours, truly,

WM. BLACK.

(Transcript Vol. 2, p. 459.)

Thereafter and on October 9th, 1912, the Adjuster again wrote to Black the following letter:

October 9th, 1912.

Mr. Wm. Black,
Long Beach, Wash.

Dear Sir:

On September 10th, 1912, we wrote you, requesting further data and information relative and supplemental to papers filed by you under policy No. 590757, issued to you by the Central National Fire Insurance Co.

To this you replied on September 10th, 1912, that you had referred the matter to your Lawyers, and since which time nothing further has been heard. If you intend making any claim, we notify you that you comply with our request of September 10th, 1912, above referred to.

(Transcript Vol. 2, p. 464.)

Thereafter and in answer to said letter, Black wrote the Adjuster the following letter, dated October 11th, 1912:

WM. BLACK,
LONG BEACH, WASH.

Oct. 11th, 1912.

W. G. Lloyd,
Portland, Ore.

Dear Sir:

What has struck you? I have complied with the law. Send you proof of loss which you refuse to receive as such and claimed in your letter that it was a memorized list. As far as I am or was concerned that letter closed the matter between you and me. I have been treated rotten by you. You have never called on me and I never saw you. This has been my first fire and I have had no experience in matters of this kind and want no more. I insured, payed my money and have met with a loss and want mine and I am going to have it; and take this from me, I have furnished you with every thing covering this my loss.

WM. BLACK.

Say you had better save your stamps, I will get them just the same with a 2 cent stamp or do you take me for a farmer.

(Transcript Vol. 2, p. 461.)

The foregoing correspondence represents all of the negotiations between the Insurance Company and Black between the date of the fire and the bringing of the action to recover the alleged loss. No personal conversation or negotiations other than this correspondence was carried on between the parties until after the action was brought in De-

cember, 1912. In January, 1913, Mr. Lloyd interviewed Mr. Black personally regarding certain matters connected with his loss.

The policy provides that the insured "as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company, or its representative, and shall permit extracts or copies thereof to be made."

The policy also provides that the insured shall submit to examination under oath by any person named by the company and subscribe the same.

The Adjuster's letter of September 10th, 1912, requesting plaintiff to produce his inventory, or certified copies of his bills of purchases, did not specify the place where the same were to be produced. This failure, however, to specify the place for the production of the papers was waived by Black's refusal to produce the papers at any place whatever. In Black's reply to said letter he stated that he had complied with the law and that the letter closed the transaction between himself and the Adjuster. He stated in his letter, "As far as I am or was concerned, that letter closed the matter between you and me." He also stated in said letter, "I have complied with the law, and take this from me, I have furnished you with everything covering this my loss."

It is a well settled rule of law that demand is unnecessary where it is shown to be unavailing, and inasmuch as Black notified the Insurance Company that he would not produce any books, papers, etc., or assist the Compnay any further in investigating

or adjusting the loss, and that he would not comply with any of the conditions on his part to be performed, any further demand on the part of the company would be useless, and specification of the place for the production of the books and papers was thereby waived.

The law does not require the performance of a useless act and where the circumstances show that a demand would be unavailing, it is unnecessary that demand should be made.

Burrows v. McCalley, 17 Wn. 269. 49 Pac. 508.

Chappel v. Woods, 9 Wn. 134. 37 Pac. 286.

In denying the Insurance Company's motion for non-suit on account of the refusal of the insured to produce his inventory, and certified copies of his books of account, bills, etc., for inspection, the Court stated that in his opinion, in order to comply with the terms of the policy, the demand must request the production of these papers at Long Beach, Washington, where the insured resided. However, it will be seen from the correspondence that the insured absolutely refused to produce any books or papers for inspection at any place whatever, and in addition to this refused to perform any of the terms or conditions of the policy on his part to be performed, in assisting the company in adjusting the loss, stating that he had complied with the law and furnished everything that was required, and that the company's letter to him requesting books and papers settled the matter as far as he

was concerned. In fact the demand for these papers is admitted in the answer and it is alleged that Black complied as far as possible, but compliance was not proven by Black.

Any one who reads the testimony in this case cannot fail to realize that this was a situation where the production of bills and inventory was highly important and necessary to aid the Insurance Compnay in adjusting the loss and securing information as to Black's stock. Black's own testimony at the trial which was evasive, contradictory and obviously false, shows how unsatisfactory his affidavit as to the amount of loss would be as evidence for the purpose of adjustment.

The production of invoices at the trial of the case and the answers to the interrogatories propounded to Black (Transcript, p. 49), show that he had knowledge as to where all of his goods had been purchased, and duplicate invoices could have been secured by him covering all of the goods which he had purchased. As stated by the Supreme Court of the State of Washington in the Ward case above cited, "He seemed to have from the start cavalierly settled this question, both for himself and the other party to the agreement."

Black, however, in his reply admits that demand was made upon him for the production of his inventory and certified copies of his bills of purchases, but alleged that he produced all papers in his possession; that he did everything within his power to comply with the demands and requests made by the insurance company, its officers, agents and servants, for information concerning the extent of plaintiff's loss.

A case almost identical is that of *Ward v. National Fire Insurance Co.* (*Wn.*), 38 Pac. 1127. In that action the insured wrote to the company, in reply to their demand for the production of certified copies of bills, invoices and other vouchers in support of his claim, as follows:

" 'I have had business with about fifteen different wholesale grocery men, both here and in other places outside, besides buying considerable goods at bankrupt sales and job lots around the city, besides credit purchase I have bought a great deal of merchandise where it would be impossible to furnish invoices.' 'Now the proposition of furnishing to you invoices of all goods bought while in business, I would be pleased to do, providing it was in my power to do so, but the circumstances that attend a business running so long are such that it renders it practically impossible to comply with your request, and I cannot see what would be gained, providing it was possible. I furnished what I supposed would be conclusive evidence that at the time of the fire I had more goods than the insurance called for.' "

In passing on the case the Court said: "It is not for the insured in the face of such an agreement to determine that because he cannot furnish all the proof as required, he will refuse to furnish any, or refuse to aid the insurer in any way in determining questions that are of vital importance to them in the case. In fact, the insured seems from the start to have cavalierly settled this question, both for himself and the other party to the agreement. He stated in his correspondence that he could not see what would be gained in furnishing this data, if

it was possible, then announced that he furnished what he supposed would be conclusive evidence that at the time of the fire he had more goods than the insurance called for, evidently resting upon the proof that he had furnished outside of this requirement."

The Court further stated, "If he knew as little about his business as his testimony would indicate, it would become very important to the insurer to have some data outside of his own testimony to satisfy it of the amount of the loss, or of the goods that were actually in the house at the time of the fire."

In the case of the *Seattle Merchants Fire Insurance Co. v. Germania Fire Insurance Co.,* 116 Pac. 585, the Court states:

" 'The obvious purpose for the provisions for an inventory is to aid in determining the value of the stock and the amount of loss to make the basis for an adjustment, and in the event of disagreement to lay the foundation for arbitration and appraisement. The assured seems to have assumed that he alone had the right to determine that the loss was total and refused in any way to aid the insurer to ascertain the actual value of the stock or the value of his salvage.' "

The Court in that case approves the case of *Ward v. National Fire Insurance Co.* above cited.

In the case of *Gross v. St. Paul Fire & Marine Insurance Co.,* 22 Fed. 74, the Court says:

"A stipulation that the assured will submit to examination on oath, etc., is valid, and is not onerous

to the insured and is for the protection of the insurer. It is akin to a stipulation requiring the insured to exhibit his books of account, invoices, etc.; one in the interest of justice and fair dealing."

In the case of *Farmers Fire Insurance Co. v. Mispelhorn* above cited, the Court held that it was not an excuse for the failure of the insured to produce duplicate bills of purchases and invoices that were not in his possession or at his command at the time the demand was made, if they could have been had by application to those who could furnish them, and he would be bound to procure and exhibit them, and the Court further holds that the burden of proof to show that they could not be procured was on the plaintiff.

Black's statement that he had complied with the law; that the letter from the Adjuster closed the matter between them and that he wanted his money and was going to have it, and that he had furnished them with everything covering his loss, was a refusal not only to produce his inventory and certified copies of his bills of purchase, but was a refusal to submit himself to examination upon oath, and was a refusal to comply with any of the other terms or conditions of the policy on his part to be performed.

The suspicious circumstances of the present case are such as to demand the application of the rules of law regarding the production of books and papers, more loudly than in most of the reported cases, as the evidence submitted by Black as to the amount of his stock on hand is very meager, unsatisfactory, evasive and suspicious.

(6) WHERE THE INSURED HAS BEEN GUILTY OF FRAUD OR FALSE SWEARING IN VIOLATION OF THE TERMS OF THE POLICY, THIS RENDERS THE POLICY VOID AND NO ACTION CAN BE MAINTAINED THEREON, AND WHERE THE FACT THAT THE INSURED HAS BEEN GUILTY OF FRAUD OR FALSE SWEARING IS CLEARLY PREPONDERANT OR UNDISPUTED, THE COURT SHOULD DIRECT A VERDICT.

In the case of *Howell v. Hardford Fire Insurance Co.,* 12 Fed. Cases, 700, the Court instructed the jury that where there is such evidence as displays a reckless and dishonest disregard of the truth in regard to the extent of the loss, it is deemed fraudulent and causes the forfeiture of all claims under the policy.

In the case of *Atherton v. British America Insurance Company,* 91 Me. 286, the Court held fraud or false swearing to "Consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true."

An examination of the testimony and evidence submitted by Black is sufficient to conclusively establish false and fraud swearing without reference to the testimony submitted by the defendant.

We first set forth some of the testimony of Black and the agent, Henry Kayler.

Henry Kayler, who wrote the policy on behalf of the Insurance Company, was called as the first witness on behalf of the plaintiff, and testified that

he had known Black for a number of years; had represented Black in a number of previous matters and in his evidence disclosed that he was intimately familiar with Black's affairs and the stock of goods.

It was contended by the Insurance Company at the trial of the case that the Insurance Agent, Henry Kayler, entered into an active conspiracy with Black to defraud the Insurance Company. This man testified that on the 18th day of May, 1912, he was employed by Black for the purpose of taking an inventory of the stock of liquors and cigars in his saloon. He testified that the taking of the inventory required two days and was completed on the 20th day of May, 1912, and for his services in taking this inventory he received $4.00. That Black assisted him in taking the inventory, Black enumerating the number of the different articles and he writing them down; that they made the inventory in triplicate, one of which was sent to a prospective purchaser, one retained by him and one given to Mr. Black. The witness Kayler testified as follows:

Q. Mr. Black was not in town at the time this policy was written, was he?

A. No, sir. I do not think he was. He was not home. He was in town when he told me to write it, but he was not at home when I delivered it.

Q. About when was that?

A. Three or four days before I delivered it.

Q. Was it delivered the same day as bears date here, on the 18th day of June?

A. No, sir. Two days afterwards, because I was waiting for him to come home.

Q. You delivered it on the 20th?

A. Yes, sir.

Thereafter the witness testified further as follows:

Q. How long before the 18th day of June did he request this policy?

A. In May.

Q. About what time in May?

A. Well, sometime about the 18th or 20th.

Q. Did he tell you that he wanted a policy on his stock?

A. Yes, sir.

Q. He was in Long Beach at the time he told you to go ahead?

A. Sure.

Q. About when was that?

A. That was about the 20th?

Q. About the 20th of May?

A. Yes, sir.

Q. You did not write it out until about the 18th of June?

A. No, sir. Because he had not finished taking stock yet. He was taking an inventory of what he did have and I helped him.

(Transcript, pages 105 and 106.)

Mr. Black testified as follows:

Q. Going back to the time of the taking out of

the policy. Before you got this policy you had insurance on your stock for $2000.00?

A. Yes, sir.

Q. And Mr. Loomis carried that insurancce for you?

A. Yes sir.

Q. Mr. Loomis is an insurance agent at Long Beach?

A. He lives at Nahcotta.

Q. That is in your neighborhood?

A. Yes, it is seven or eight or ten miles.

Q. Now, his policy expired on the 16th of June, didn't it?

A. No, sir. It expired in July.

Q. July, 1912?

A. I think so. I would not be positive.

Q. And you returned this policy to him on the 8th of June, didn't you?

A. I returned his policy to him after I took out another policy; that is the present policy.

Q. And you returned this policy to him before it expired?

A. I returned it before it expired, yes, sir.

Q. And between the time that you had that $2000.00—between the time that you returned that insurance of his and the time you took out this policy, you had a policy of $5000.00 in the Royal Insurance Company, which was cancelled too, didn't you?

A. On that (interrupted).

Q. On the stock of goods?

A. Now, I will tell you—I do not—there is something about it—I do not know whether it was before or whether it was on the hotel that I took it out, after the fire. I know there was a policy or two, somebody wrote up these policies and then they wrote back the agent did not care to take the risk under the present conditions, down there. I do not know whether it was on the saloon or whether it was on the hotel at the time of the fire. I had no policy on the hotel, but after this fire I took out a policy and it was rejected, sent back, and I saw the letter and they said to the agent they did not wish to take the risk under the present conditions, or something to that effect, existing in Long Beach at that time. (Transcript 213-214-215.)

The testimony disclosed that Black turned the keys of his saloon over to his bartender, Don H. Dickinson, on the 27th day of May, 1912, and that said bartender had entire charge of the business until its destruction on the 27th of June, 1912. That Black was in his saloon from May 27th to June 27th, only once for a few minutes, Saturday evening preceding the fire. The bartender testified that there were three rooms in the building, the front room was where the bar was located, and two back rooms; one of the back rooms was used for a storeroom where case goods were located; the other back room was merely a side entrance. That the storeroom contained the case goods and a few barrels; that the storeroom was 12 feet by 15 feet by 10 feet high, and that the small room was not used for anything especially. That the whiskey barrels were kept in the front room and that the case goods,

beer barrels, empty beer bottles, soda water and two or three barrels of whiskey were located in the storeroom; that as soon as he sold a case of liquor, he burned the empty case in the stove. That he sold all of the goods that were in the showcases and opened up about two cases more. That no liquors or cigars were received while he was in charge of the saloon. That there were at least fifty cases of case goods in the back room; that they were all piled up in one row and took the whole side on the north side of the building, except where the windows were; that the case goods were piled in one row on the north side of the storeroom, about half way to the ceiling, just on one side of the room; that the barrels of beer, soda water, empty bottles, the stove and two chairs were all in the back room. That there was a large door between the storeroom and the saloon bar; that the bottles were stored away in the little room which was not used; that the one stove heated all the rooms; that the size of the entire building is 25 feet by 60 feet outside measurement; that the upstairs was not being used at that time; that there was no goods stored up there to his knowledge.

The inventory attached to Black's proof of loss contained 30 barrels of whiskey and wine, 7 barrels of beer, and 1 barrel of soda water, and 157 cases of case goods. Bearing in mind the size of the room, which was 12 feet by 15 feet by 10 feet high, it will be readily seen that the amount of goods which Black claimed he had on hand could not have been contained in this entire room. Black's testimony shows that each case of case goods was 2 feet wide and 2½ feet long, and 14 inches high

(Transcript, p. 182). The case goods would occupy a space of over 800 cubic feet (while the room contained 1800 cubic feet of space) to say nothing of the barrels of beer, soda water, chairs, stove and other vacant spaces in the room. The case goods claimed to have been destroyed would have covered the entire floor space of the room, nearly half way to the ceiling, while the testimony shows that there was but one row of case goods along the north wall which reached about half way to the ceiling, and that it did not even cover the entire north wall, leaving spaces where the windows were.

Black testified that there were three large show cases in the bar room containing imported bottled goods, each containing 12 cases of case goods, or a total of 36 cases, making the total number of cases claimed 193, (Transcript, pages 182-3), while Mr. Dickinson, the bartender, testified that all of the case goods were sold by him out of the show cases and two of the other cases in the storeroom were also sold. (Transcript, p. 148.) It appears therefore from the undisputed testimony that there were 38 cases less of case goods in the saloon at the time of the fire than at the time of taking the inventory, in addition to sales of cigars, and whiskey out of the barrels, and also beer. Black in his affidavit and proof of loss swore that all of the stock was in his saloon at the time of the fire that was included in his inventory taken on May 18th. That this was a wilfull and deliberate attempt to defraud the insurance company there can be no doubt. It will be remembered that there were triplicate copies of the inventory made, one of which was attached to the proof of loss, which proof of loss was

introduced in evidence and marked Plaintiff's Exhibit "3" (Transcript, p. 432). The other inventory was retained by Henry Kayler, the insurance man and introduced in evidence and marked Defendant's Exhibit "A8" (Transcript, p. 455).

The inventory retained by Henry Kayler, (defendant's Exhibit "A8,") and the inventory attached to Black's proof of loss, being the one retained by him, are identical. Black made claim for the entire amount of goods which he claimed he had on hand on May 18th, without allowing any deduction for sales, which, as the undisputed testimony shows, amounted to considerable between the date of the inventory and the date of the fire. The items of the inventory attached to the proof of loss make a total sum of $7378.85, and in spite of the fact that this included a large number of articles not covered by the policy and not items of stock, and about six weeks' sales, and that the value of most of the items was grossly exaggerated, Black testified at the trial and swore, that the value of his stock at the time of the fire was over $8000.00, thus adding nearly $700.00 to his already grossly excessive claim. The undisputed testimony is that Black wilfully made claim for the entire amount of goods sold by him between the date of the inventory and the date of the fire at a grossly exaggerated value.

The testimony shows that the largest items of his stock were purchased from Blumauer & Hoch, of Portland, Oregon, and their disposition, with statement attached (Transcript, pages 466-7-8), shows that he purchased the total amount of $2643.25, and that they were all the goods they sold him, although Black testified that he bought more than that amount from them.

He also testified that said firm was not the firm with whom he did the largest business, although he was unable to give the name of any other firm from whom he had ever bought more than three or four hundred dollars worth of goods. Of the items claimed by Black in his proof of loss more than $2200.00 of the amount at the prices listed by him, were purchased from Blumauer & Hoch, and yet one-half of his entire purchases from this firm were made during the year 1908, and the other half in 1909.

An examination of the interrogatories propounded to Black prior to the trial discloses that he was able to state from memory the firms from whom he purchased the forty or more different items about which he was asked, some of the items amounting to just a few dollars and were purchased eight years prior to date of his answer, yet he could not recall the name of the firm with whom he had transacted more business than he had with Blumauer & Hoch.

Answering Interrogatory No. 42 (Transcript, p. 62), Black stated that he had to rely upon casual memory, as he had no book account or invoices, original or copies thereof, of the goods he purchased for his saloon at Long Beach, Washington, because the same were destroyed when his saloon was burned with all its contents, yet the testimony at the trial disclosed that at the time he made proof of loss he had in his possession an original duplicate inventory made on May 18th, 1912, and that another original duplicate inventory was in the custody of his agent, Henry Kayler, which inventory was introduced in evidence and marked Defendant's Exhibit "A8."

By an examination of the answers to the forty-two interrogatories propounded to Black (Transcript, p. 49), it will be observed that in answering each interrogatory Black testified "for the reason that his books and copies of inventories were destroyed and lost by having burned in the building where said stock was kept."

It will be further observed that in answering said interrogatories, although Black said he had to rely upon casual memory, he was able to give the names of the dealers from whom he had made very small purchases as much as five and six years prior to the date of the fire. Many of the firms who sold him goods, which he claimed were destroyed in the fire, had transacted no business with him since 1906.

In Black's proof of loss there is an item of one barrel of Fox Mountain Whiskey, for which he claimed $400.00. This whiskey was purchased by Black on January 25th, 1911, for $162.43 (Invoice of same Transcript, p. 469-470). We submit herewith some of Black's testimony regarding it:

Q. In your proof of loss you claim one barrel of Fox Mountain whiskey, not tapped, four hundred dollars. Where did you buy that barrel?

A. I bought it from Brown, Foreman & Company.

Q. What did that cost you?

A. I think that was six or seven and a half a gallon.

Q. You heard Brown & Foreman's testimony as to what you paid for it?

A. Yes, sir.

Q. How many gallons was there in that barrel?

A. I do not remember.

Q. Is it not a fact that you did not pay only a hundred and fifty dollars for that barrel of whiskey or about that much?

A. I paid more than that for it.

Q. Is it not a fact that you paid less than two hundred dollars for that barrel?

A. I was offered ten dollars a gallon for that whiskey.

Q. What year did you buy that whiskey? Didn't you buy that in 1911?

A. I think I did.

Q. Well, that was not very old?

A. Why, certainly it was.

Q. It was old when you got it?

A. It was old when I got it.

Q. How did you happen to get it so cheap?

A. A friend of mine got it for me—they found that afterwards; they found it in their warehouse and did not know that they had it.

Q. Brown & Foreman Company friends of yours?

A. They are; yes, sir.

Q. They are in the wholesale liquor business?

A. They are distillers.

Q. Who is your friend in that company?

A. Why, their agent.

Q. What is his name?

A. His name is Walton.

Q. Do you mean to tell this jury that barrel of liquor you bought in 1911 for less than two hundred dollars a barrel, was worth four hundred dollars?

A. I tell you, gentlemen, I could have put a big price on that liquor. That was a rare piece of goods. I would sell no one a bottle of it. Now, that barrel was tapped; it was not untapped, but it had only been tapped a little while, and there was very few people that ever took a drink out of it. I sold it for twenty-five cents a drink.

Q. Who were some of the people you sold out of it?

A. Very few.

Q. If it was not untapped, why did you swear in your proof that it was untapped?

A. Well, I had just tapped it.

(See Transcript, p. 179 and 180.)

Later on in Black's cross examination the following appears:

Q. In your proof of loss, you made a claim for a barrel of Fox Mountain whiskey. I will ask you if you bought that from Brown-Foreman & Company?

A. Yes, sir.

Q. And you paid for that whiskey $162.43? That was the testimony of the company?

A. I guess so; I guess that is it.

Q. You claim now $400 for it, and you bought that liquor in 1911?

A. I was offered $10 a gallon for that whiskey. It was a pick-up.

Q. I am not asking you that. I am asking you, if you claim $400 for liquor that you bought in 1911?

A. Yes, but—(interrupted).

Q. On your proof of loss, you asked $400 for that barrel of liquor?

A. Yes, sir.

Q. And you tapped it and took some out of it?

A. No liquor sold out of that barrel. I had given some—let some people taste it, but it was over one hundred and twenty proof.

Q. You will swear that you never sold any whiskey out of that barrel?

A. Never sold any of that out of that barrel—(interrupted).

Q. Didn't you testify yesterday you sold some at twenty-five cents a drink?

A. I was going to sell that at twenty-five cents a drink.

Q. Is not that what you testified to yesterday?

A. There was a few people tasted that whiskey; I never sold any of that whiskey.

(See Transcript, p. 197 and 198.)

It will be seen from the above quotations from the testimony, that although Black swore in his proof of loss that said whiskey was untapped, he testified at the trial he had been selling said whiskey at twenty-five cents a drink. The next day when the subject was again brought up, he swore positively that he never sold any of the said liquor. As a further illustration of the type of testimony upon which the verdict and judgment in this case was based, we submit the following:

Black had testified that he had returned to Long Beach from Portland the Friday night preceding the fire, and the following questions were asked him (Transcript, p. 186):

Q. Do you know how late Mr. Dickinson kept open that night?

A. I do not.

Q. Did he give you the money when he came home that night?

A. Yes, sir.

Q. Gave you the money personally; did not give it to your wife?

A. No, sir. I was there and he gave it to me.

Mr. Langhorne: What week are you talking about?

Mr. Cole: This was on Friday preceding the fire. You said, Mr. Dickinson gave you the money that night?

A. Yes, sir.

(It will be remembered that *Dickinson* testified that he did not see Mr. Black until Saturday preceding the fire.) (Transcript, p. 144-145.)

Q. When Mr. Dickinson testified, as you heard this afternoon, that he did not see you until Saturday, he was wrong?

A. It may have been Saturday. I do not testify positively I saw him Friday night. I do not remember.

Q. Well, he gave you the money?

A. He gave it to me Saturday night, one night while I was there; he gave it to me, I think, Saturday night. I do not think I saw him Friday night.

Q. You did not see him the Friday night when he gave the money to your wife?

A. Probably did; I do not believe I saw him Friday night.

In addition to the character of the testimony given by Black, it will be remembered that the uncontradicted evidence in the case shows that Black's reputation for truth and veracity in the community where he lives, is poor.

Black attempted to explain the high prices demanded for goods in his inventory on the basis that his trade demanded a high class of liquor. (Transcript, p. 164.) However, the next day Black testified that most of the stuff drank at Long Beach was beer. (Transcript, p. 231-232.)

In Black's proof of loss was a claim for three barrels of Penwick Rye whiskey. This whiskey was sold to him by Blumauer & Hoch, who sold him a total of five barrels in 1908. At that time they sold him five barrels of Penwick Rye, five barrels of Green River, and in 1909, five barrels of Old Crow. This lot of liquors bought by Black from Blumauer & Hoch constitute a large part of his claim for

goods lost in the fire. The invoice of the number of gallons and the cost price of these liquors is found on pages 466-7-8 of the Transcript.

Black also testified that Green River whiskey contained 46-47 and 49 gallons to the barrel (Transcript, p. 228). Invoice shows 35-36 and 37 gallons to the barrel (Transcript, p. 466). He testified that Penwick Rye barrels contain about the same number of gallons, while the invoice shows 38 and 39 gallons to the barrel. (Transcript, p. 467.) He testified that his barrel of Old Crow contained 47 and a fraction gallons when he first bought it (Transcript, p. 227), and the invoice shows 40 and a fraction gallons to a barrel (Transcript, p. 467).

Black testified that he had some article in his saloon not listed in the proof of loss (Transcript, p. 169 and 170). He stated that the goods consisted of liquors and cigars, for which he had paid $350.00 at sheriff's sale in 1911—being the stock of a man named Nye. The cigars he sold (Transcript, p. 170). Some of the liquors were also sold to another liquor dealer, the amount was uncertain but enough to supply him for several days (Transcript, p. 231). There is no testimony anywhere as to the amount or value of said liquors on hand at the time of the fire, if there were any, and the evidence indicates pretty strong that there was none of said liquors on hand at the time of the fire. The bartender Dickinson testified that there were none to his knowledge. (Transcript, p. 156.)

With reference to there being any liquors upstairs in the room, the witness Kayler testified as follows: (Transcript, p. 112.)

Q. No other case goods were kept in any other rooms except these two?

A. He had another room out on the other side where he had some in, and then he had some upstairs.

After asking two or three more questions the following question was asked:

Q. How many did he have upstairs?

A. I do not know whether he had any of the case goods.

Thereafter, later on in Kayler's testimony the question was again repeated as follows:

Q. There was no case goods upstairs?

A. Yes, there was, but I did not take an invoice of them.

In answer to interrogatories No. 26 and No. 28 (transcript p. 57) Black testified that the item of three cases of Atherton whiskey and two cases of McBrayer's whiskey, which were listed in his proof of loss, were purchased at sheriff's sale from A. B. Nye & Company. This is directly contradictory to the statement that these goods purchased were placed upstairs in his room and not placed with his other stock. The statement of Black that he had the stock upstairs which he purchased at sheriff's sale in 1911 and which was not included in his proof of loss, was a willful and deliberate falsehood.

With reference to moving some liquors out from an outbuilding into his saloon in May, 1912, prior to the fire, Black testified as follows: (Transcript p. 216.)

Q. How many barrels did you have in that outbuilding?

A. A number of them. I could not state how many.

Q. Did you have two?

A. Oh, yes, a lot more than that.

Q. A dozen?

A. Six or seven or eight barrels in there.

Q. What brands were they?

A. Different brands.

Q. Name some of them.

A. There were five barrels of Old Crow in there.

The next day he testified, when asked relative to the same matter, as follows: (Transcript p. 400).

Q. Let us get back to this whiskey you moved into your saloon in May; how many barrels did you move in; have you any idea as to the number or have you forgotten?

A. I have forgotten what I moved in there.

Henry Kayler testified as the principal witness on behalf of the plaintiff. The evidence shows that he had been in Black's employ considerable, visited Black's saloon nearly every night, purchased considerable liquor from Black, and was in the saloon on the night of the fire from about nine o'clock until closing time, about 11:30, and that he left when the bartender went home. His evidence was evasive and contradictory.

The bartender testified that there was a stove in the back room where the case goods were stored, and that he had a fire in the stove on the day of the fire and that he burned up the empty cases in the stove. However, Kayler testified that there

was no stove in the building at the time of the fire. (Transcript p. 110):

Q. There is a stove and tables and chairs in there?

A. No, not in the summer-time.

Q. Where were they?

A. The stove was moved out doors.

In Black's proof of loss were two barrels of Clark Bros. whiskey, which he said were untapped and made affidavit to that effect. However, the undisputed testimony shows that it had been tapped (Transcript p. 115). Black was, therefore, guilty of false swearing in connection with this item of two barrels of Clark Bros. whiskey, as he wilfully and deliberately swore that it was untapped when part of it had been sold.

Kayler corroborated the bartender's testimony that the case goods were piled in one row on the north side of the back room (Transcript 109).

Black was also guilty of willful and false swearing in connection with his answer to Interrogatory No. 41, (Transcript p. 61), wherein he stated that a portion of his stock which was burned was purchased from the Sunnybrook Distilling Company. His testimony at the trial disclosed that the Sunnybrook whiskey which he purchased from the Sunnybrook Distilling Company was resold by him to Blumauer & Hoch, and that he never had any Sunnybrook whiskey in his saloon (Transcript p. 210 and 211).

It will be remembered that the Penwick Rye and Green River whiskies were purchased by Mr. Black in 1908 before he left Ilwaco and that he

shipped them from Ilwaco to Long Beach on the Ilwaco Railroad. The evidence of the railroad company shows that Black shipped 24 barrels of liquor on June 16, 1908, from Ilwaco to Long Beach (Transcript p. 452), and that all of the barrels were "only part full." That the 24 barrels of liquor, two show cases, one cash register and five chairs weighed only 4000 pounds. There is no evidence as to what the show cases, cash register and chairs weighed, but it will readily be seen that the 24 barrels of liquor could not have weighed more than 3600 pounds, and probably weighed less, which would be an average of 150 pounds per barrel. This whiskey had been in wooden barrels for several years and the barrels were undoubtedly very heavy. It is highly improbable, therefore, that there was over 75 pounds of whiskey in each barrel, which would be about eight gallons.

Black testified that when he moved from Ilwaco to Long Beach in 1908, he moved five barrels of Green River whiskey and five barrels of Penwick Rye whiskey (Transcript p. 174).

One barrel of 1899 Old Crow whiskey was purchased from F. Chevalier & Co. of San Francisco (Transcript p. 50). The deposition of Mr. J. A. Fogahty (Transcript p. 359) shows that said whiskey was sold to Black prior to April 18, 1906, said barrel of whiskey if it was contained in Black's saloon at Long Beach was moved in the same shipment.

"The Court will take judicial notice of standard legal weights and measures." Elliott on Evidence, Vol. 1, Sec. 73.

The two barrels of Clark Bros. whiskey weighed 838 pounds (Transcript p. 448).

Webster's Dictionary states that one gallon of water weighs ten pounds. That the specific gravity of whiskey is not less than .917 or more than .930. Ten barrels of Green River and Penwick Rye whiskies contained 377.97 gallons; the weight of these ten barrels of whiskey, therefore, would be a little over 3440 pounds exclusive of the barrels. The number of gallons of 1899 Old Crow whiskey is not given but, assuming that this barrel contained thirty gallons, this would make the total weight of these eleven barrels of whiskey 3700 pounds, exclusive of the barrels. As the entire shipment weighed only 4000 pounds and this shipment included twenty-four barrels of whiskey, two show cases, one cash register and five chairs, there is no doubt whatever but that the barrels were nearly emptied of their liquor before Black moved to Long Beach. The eleven barrels of whiskey above mentioned account for the entire weight of the shipment; this leaves thirteen barrels partly filled, two show cases, one cash register and five chairs unaccounted for as to weight.

It will be remembered that Black testified the barrel of 1899 Old Crow whiskey above mentioned was untapped at the time of the fire and that the two barrels of Green River whiskey were also untapped. It was the theory of the Insurance Company at the trial of the case that the alleged inventories produced by Black and Kayler and claimed to have been taken by them in May, 1912, were fake inventories and were made up merely for the purpose of defrauding the Insurance Company, after the

property was burned, and the evidence strongly supports that theory. There seems little doubt but that the alleged inventory was, at the time it was made up, intended to be made a part of a proof of loss, instead of being made up for the purpose of a proposed sale of the stock. In view of the weight of the shipment from Ilwaco to Long Beach can there be any doubt that the railroad's description of the 24 barrels as "only part full" was correct?

The first witness called by Mr. Black (S. A. Madge), testified that nearly every barrel of Black's whiskey was tapped. The following quotation is taken from his testimony. (Transcript, p. 71.)

"It was in barrels and the barrels were racked up, and the barrels were all tapped, and I tested quite a bit of it, because I felt it was my duty to do so."

In addition to the testimony, the uncontradicted evidence of several witnesses, shows that the reputation of Henry Kayler and William Black for truth and veracity is poor in the community in which they lived.

William S. Shagren, deputy assessor for Pacific County, Washington, made an assessment on Black's stock of liquors in March, 1912, and testified for the defense at the trial that Black stated at the time of the assessment that he was afraid the place was going dry and that he was letting his stock run down. The property at that time was valued at $600, which amount was agreed between the deputy assessor and Black to be a fair value. That he was assessing personal property at that time at 60 per cent, the $600.00 however represented full 100 per cent valuation. (Transcript, pp. 285 and 287.) The

tax statement was subscribed and sworn to by Black on the 13th day of March, 1912, and sets forth that the stock, furniture of sample rooms, saloon, etc., was $600.00. (Transcript pp. 282-283.)

Z. B. Brown, assessor for Pacific County, Washington, testified that he had a conversation with Black in March, 1912, and that Black gave him to understand that he had given a fair assessment and that his stock was low. (Transcript pp. 280-281.) That $600.00 valuation was supposed to be a fair valuation of the property and the deduction of 40 per cent was made by the assessor.

In addition to this, the evidence disclosed that Black's sales between the assessment and the date of the fire exceeded his purchases. In 1910 he placed a total valuation on his stock of $1600.00.

In case of the destruction of a stock of goods by fire, knowledge of the amount of loss lies entirely within the breast of the insured, and the law requires that he shall be fair, frank and honest with the insurer respecting the amount and extent of his loss.

Even though the terms of the policy did not provide that false swearing should render the policy void, public policy requires that the insured should be honest in his proof of loss. As stated by the Supreme Court of the State of Washington, in the case of *Pencil v. Home Insurance Company,* 28 Pac. 1034:

"It is beyond question that aside from the terms of insurance contracts, public policy requires that every person whose property which has been covered by insurance is destroyed, shall be frank, open and honest with the insurer or lose all benefits of his contract."

There can be no other conclusion drawn from the evidence in this case but that Black's proof of loss is permeated with fraud in every particular, and that he swore falsely regarding every material matter connected with his case. Public policy, as well as private justice, demands the application of the rules of law against false swearing and fraud in this case. Public policy demands that fraud and false swearing should not be rewarded, with a money judgment.

The evidence in the case indicates that at the time the property was burned Black's license was about to expire; he had recently increased the amount of his insurance; and the building was unlocked at the time of the fire. The only testimony given by Black regarding the cause of the fire was that it was his opinion that his property was burned by his enemies. (Transcript, p. 220.)

The motion for directed verdict should have been sustained. (Assignment of Error X.)

THE AMOUNT OF THE POLICY IS NOT EVEN PRIMA FACIE EVIDENCE OF THE AMOUNT OF THE LOSS.

> Lyon Fire Insurance Co. v. Starr, 71 Tex. 733; 12 S. W. 45.

At the conclusion of the trial, upon request of the plaintiff, the court instructed the jury as follows:

"It is provided by the statute of the State of Washingtgon (Sec. 105, Laws of 1911, p. 243), as follows:

" 'Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire

insurance policy covering on any building or property or interests therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurance value of the building or property or interest therein at the time such insurance is affected.' Under this provision of the law I charge you that the defendant insurance company was presumed to know at the time it issued this policy of insurance in the sum of $5000.00 covering the property described in said policy, and situated in the buildings described in said policy, the value of said property. If it now claims otherwise the burden of proof rests with the defendant to so show by a fair preponderance of the evidence."

The foregoing instruction was clearly misleading and confusing to the jury and calculated to create in their minds the presumption that the amount of the policy was the amount of plaintiff's loss, and that the burden of proof was upon the defendant to show that the property was not worth $5000.00.

The first sentence of the above charge was taken from Sec. 105, Session Laws of Washington, 1911, and was intended to apply, as a rule, of evidence in a criminal action against the insurer or insured in a prosecution for over-insurance, but can have no connection with a civil action to recover under an insurance policy, as the measure of damages for personal property still remains the value of the property at the time of the loss. This rule is not denied by counsel for defendant in error and the court so instructed the jury. Sec. 105, out of which a portion of the above charge is taken, reads as follows in full:

"Every insurer who makes insurance upon any

building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected. Any insurer who knowingly makes insurance on any building or property or interest therein against loss or damage by fire in excess of the insurable value thereof, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars. Any agent who knowingly effects insurance on a building or property or interest therein in excess of the insurable value thereof, shall be fined not less than fifteen nor more than twenty-five dollars. Any person or party who knowingly procures insurance against loss or damage by fire on any building or property or interest therein owned by him in excess of its insurable value shall be fined in a sum not less than twenty-five dollars nor more than one hundred dollars."

Inasmuch as the date of the fire was only about seven days from the delivery of the policy, the above instruction practically directed a verdict in favor of the plaintiff, and in view of the fact that the verdict is an extraordinary one and was returned in the face of conclusive evidence against the plaintiff, it is very likely that the above instruction given by the court very decisively affected the jury. The instruction has no place whatever in a civil action and was very confusing to the jury, to say the least.

It may be contended by defendant in error that

plaintiff's exceptions to the instructions given by the court to the jury, and the exceptions to the refusal of the court to give certain instructions requested by the defendant, should not be considered because the exceptions should be taken in the presence of the jury. The record indicates that the jury retired upon the conclusion of the court's charge; that immediately upon the conclusion of the charge exceptions were taken by counsel for the insurance company; that immediately after the conclusion of said exceptions the court recalled the jury before they had commenced to deliberate upon their verdict, and gave them further instructions. The reason for the rule for exceptions to instructions to be taken before the jury retires is to allow the court an opportunity to correct or modify his instructions. The fact that the court allowed the exceptions in the present case shows that he was satisfied with the instructions given and would not make any change therein, and inasmuch as the court had an opportunity to correct his instructions, after exceptions thereto were taken, before the jury retired to consider of their verdict, the reason of the rule is complied with. There was in effect at the trial of the action certain printed rules regarding exceptions to a charge, which appears by the certificate of the district judge. (Transcript, p. 503.) Rule No. 58 of the Printed Rules of Practice of said court provides that exceptions to a charge "may be taken by any party by stating to the court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, etc." It would seem in the present case that the plaintiff in error having complied with the printed rules of the court, which prevent

the taking of exceptions to instructions until the jury have retired, and the further fact that the court had every opportunity to make corrections before the jury retired to consider of their verdict, and that he was satisfied to allow the exceptions to the instructions rather than make any corrections, should not prevent the plaintiff in error from having the court's instructions reviewed in the present case, as the reason for the rule had been fulfilled. Nor should plaintiff in error be denied the right of review for following the printed rules of the court.

The Supreme Court of the United States in the case of *Gandia v. Pettingill,* 222 U. S. 452, held that exceptions taken to instructions under circumstances similar to the case at bar, would be sufficient although the better practice would be to take exceptions before the jury retired. Justice Holmes, in passing upon the point used the following language:

"Exception was taken to the judge sending the jury out before counsel for the defendant had stated all of his exceptions to the charge. The judge had told the counsel that he would not instruct otherwise than as he had and he allowed all exceptions to be taken in open court after the jury had retired. No doubt it is stricter practice to note exceptions before the jury retires (the judge, of course, having the power to prevent counsel from making it an opportunity for a last word to them). In this case they were noted at the trial in open court and in the circumstances stated the defendant suffered no wrong, so that we should not sustain an exception upon this ground."

The same reasoning applied by the Supreme Court applies to the case at bar. The district judge

had an opportunity to correct his instructions had he so desired, but instead stated that he would allow exceptions, thereby stating in substance that he was satisfied with the instructions given, and it seems to us that to hold under the present circumstances that the exceptions to instructions taken by plaintiff in error are not sufficient to present the matter for review, would be placing form above substance. The responsibility for sending a jury out before exceptions can be taken should not fall upon a litigant.

THE VERDICT WAS CONTRARY TO LAW AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT AND THE MOTION FOR A NEW TRIAL SHOULD HAVE BEEN ALLOWED BY THE COURT.

In denying the motion for a new trial the District Court said he was inclined to believe that the verdict was excessive, but that if the insurance company had selected an agent as bad as they claimed Henry Kayler to be, they must expect to suffer some embarrassment by reason thereof. In answer to that we will state that the insurance company knew nothing about the relations of Henry Kayler with Black until the trial; had they known what kind of a man he was they would certainly not have selected him as their agent at Long Beach. The court instructed the jury that if Black was guilty of false swearing in connection with his loss, that he could not recover even though the amount of the loss exceeded the amount of the policy. (Transcript, p. 420.)

That Black was guilty of false swearing in connection with the different items of his stock and also of the entire stock as a whole was conclusively

proven, and the verdict was against the instructions and contrary to law.

The size of the room where the case goods were stored was shown by the undisputed testimony to be 12x15x10 feet high and it was impossible for Black to have had the amount of stock in the saloon which he claimed. The verdict being contrary to law, opposed to the instructions of the court, unsupported by sufficient evidence as to the value of the property, and against conclusive evidence of false swearing, the verdict and judgment should have been set aside by the court.

In instructing the jury relative to the production of inventory, bills of purchase, etc, the court said:

"If there is nothing more in the case than the request in those letters, then his failure to produce copies would not defeat his action, because they did not ask him to produce them at any particular place in those letters."

It will be remembered that the answer admits the demand for inventory and bills of purchases, and endeavors to meet the same by saying that Black produced all in his power. Moreover, Black stated in his letter that he would not produce any bills, or papers or perform any of the conditions or terms of the policy on his part to be performed. Therefore, the court's instruction that if there was nothing more than the request in those letters, was not proper under the pleadings and evidence. The facts in regard to the production of invoices, bills of purchase, and the refusal to perform the conditions subsequent on the part of Black being admitted, the question became one of law, and the court should have set aside the verdict and judgment.

Nor was there any proper evidence as to the market value of the property.

If the verdict of the jury is against the weight of evidence or unsupported by the evidence, it is the duty of the court to set aside the judgment and grant a new trial.

Heddin v. Iselin, 142 U. S. 676.

Pleasants v. Fant, 22 Wall. 120.

Assignment of Error XIII.

WHERE THE INSURED PLACES AN EXCESSIVE VALUATION ON HIS PROPERTY OR ON SINGLE PORTIONS THEREOF, AND SUCH EXCESSIVE CLAIM WAS MADE CARELESSLY OR NEGLIGENTLY, THIS CONSTITUTES FRAUD AND FALSE SWEARING THE SAME AS IF THE CLAIM WAS WILFULLY MADE, AND THE INSURANCE COMPANY'S REQUESTED INSTRUCTION, AS FOLLOWS, SHOULD HAVE BEEN GIVEN.

"If you find from the evidence that the plaintiff in his sworn proof of loss, placed an excessive valuation on the whole property burned, or on single portions or quantities thereof, and that such excessive claim was willfully or carelessly made, then your verdict should be for the defendant."

The insured has no right to place a careless or negligent valuation on his property where the means of knowledge are at hand, for obtaining accurate information.

IT IS THE DUTY OF THE COURT TO IN-

STRUCT THE JURY UPON THE MATERIAL ISSUES OF THE CASE. THE COURT DID NOT INSTRUCT THE JURY THAT IF THE PROPERTY WAS DESTROYED BY THE ACT, PROCUREMENT OR DESIGN OF THE PLAINTIFF THEY SHOULD RETURN A VERDICT IN FAVOR OF DEFENDANT. THIS WAS ONE OF THE MAIN ISSUES IN THE CASE AND THE JURY SHOULD HAVE BEEN INSTRUCTED ON THAT POINT.

THE DISTRICT COURT GAVE JUDGMENT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT FOR FIVE THOUSAND DOLLARS WITH INTEREST THEREON AT SIX PER CENT. PER ANNUM FROM THE 6TH DAY OF DECEMBER, 1912, ALTHOUGH NO INTEREST WAS PRAYED FOR IN THE COMPLAINT, AND THE COMPLAINT CONTAINED NO ALLEGATION WHATEVER IN REGARD TO INTEREST.

Assignments of Error 11 and 12.

We believe that a careful examination of the evidence submitted in this case conclusively shows that the loss was not an honest one, and that there was not sufficient evidence to sustain the verdict for five thousand dollars.

We respectfully submit that the judgment of the District Court should be reversed on account of the errors assigned, and the action dismissed.

Cole & Cole,

Attorneys for Plaintiff in Error.

No. 2395.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL NATIONAL FIRE INSURANCE COMPANY OF CHICAGO, ILLINOIS, a Corporation,
Plaintiff in Error,

vs.

WILLIAM BLACK,
Defendant in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Brief of Defendant in Error

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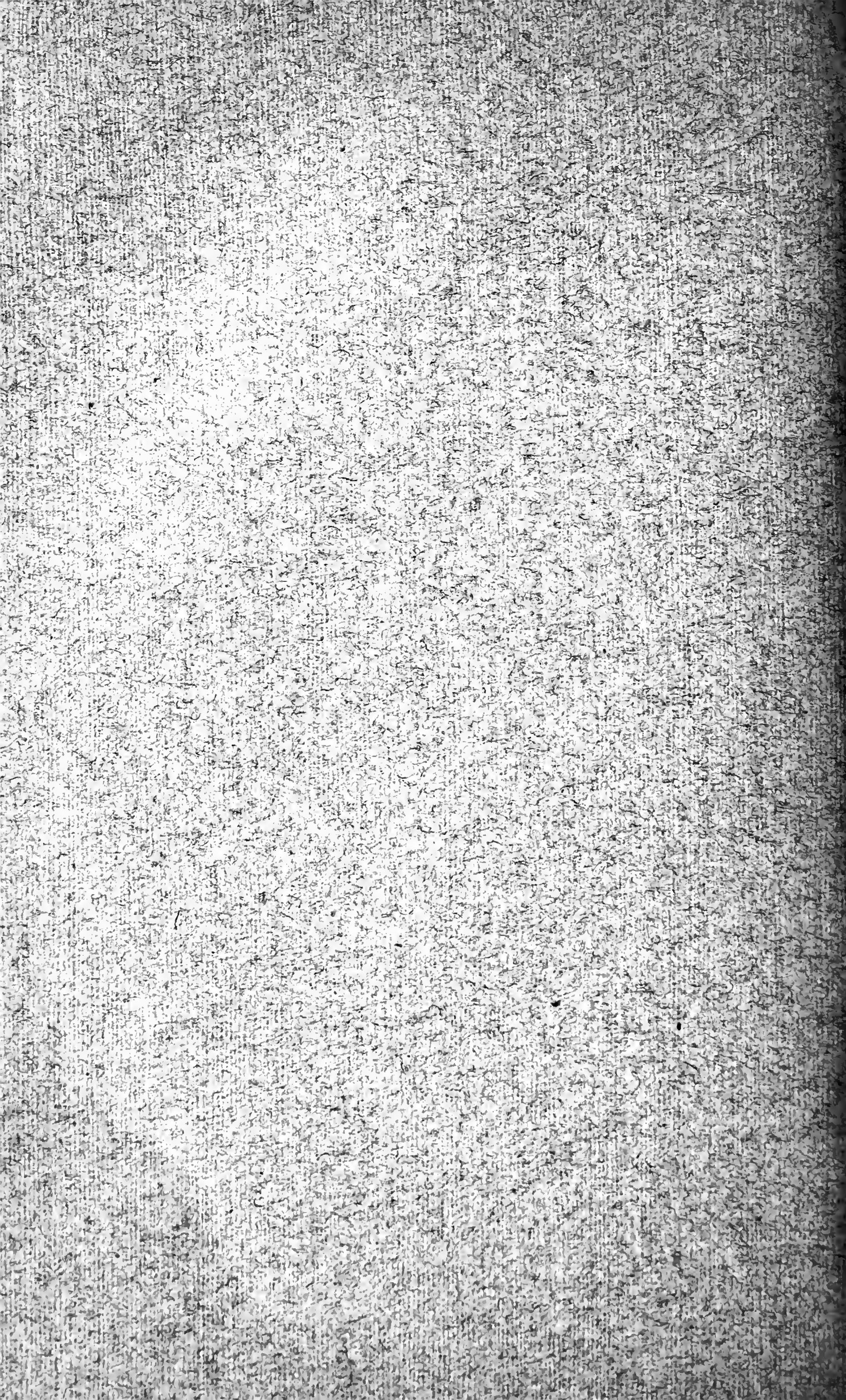

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STATEMENT OF THE CASE

This action was instituted by defendant in error to recover the sum of $5000.00, based on a contract of insurance. The complaint alleges that on a date certain plaintiff was the owner of a stock of mer-

chandise, consisting principally of wines, liquors, cigars, beer and soda and mineral waters; that on June 18th, 1912, in consideration of the premium of $137.50, the plaintiff in error, insurance company, issued to defendant its policy of insurance. whereby it insured the defendant for the term of one year "against all direct loss or damage by fire, ... to an amount not exceeding Five Thousand Dollars, ... on his stock of merchandise, consisting principally of wines, liquors, cigars, beer, soda and mineral water and all other goods, wares and merchandise not more hazardous kept for sale by assured, while contained in two-story shingle roofed frame building and adjoining and communicating additions thereto, while occupied as saloon and situated on Lot 6, Block 6, Tinker's North Addition to Long Beach, Pacific County, Washington."

The policy was issued on June 18th, 1912, and duly countersigned by Henry Kayler, agent of the company at Long Beach, Washington. On June 27th, 1912, the property so insured was *totally* destroyed by fire. Immediate notice of the loss was given, and formal proof of said loss was made out and served on the company on August 23rd, 1912.

The policy in question contained the following, among other provisions:

> "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the dam-

aged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon. . "

"The insured, as often as required, shall exhibit to any person designated by this company, all that remains of any property herein described, and submit to examinations under oath by any person named by this Company and subscribe the same; and, as often as required, shall produce for examination all *books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this Company*, or its representative, and shall permit extracts or copies thereof to be made."

About two weeks after the fire one W. G. Lloyd, an adjuster in the employ of the defendant, went to Long Beach, the place where the fire occurred, to make an investigation, but did not visit or talk with the plaintiff in this action. (Tr. pp. 263-264). This visit was evidently made in response to a telegram sent to Davenport Dooley & Co., of Portland, Oregon, agents of the defendant, by Henry Kayler, agent of the company at Long Beach, Washington, which telegram is as follows:

"Long Beach, Wn., June 27, '12.

"Davenport Dooley & Co.,

"Portland, Ore.

"Risk covered by policy 590757 burned this morning, prosecuting attorney on spot investigating. Total loss.

"P. KAYLER, Agent."

(Tr. p. 432.)

On July 3rd, 1912, plaintiff wrote to Davenport Dooley & Company as follows:

"July 3rd, 1912.

"Davenport Dooley Co.,

"Portland, Ore.

"Dear Sir:

"I have *meet* with a loss on June 27 *with* doubtless you have been notified. Now I wish you to send adjuster or representative as I wish to clean up premises in order to rebuild. Rours Respect.,

"WM. BLACK."

(Tr. p. 456.)

No reply was ever made to this letter. On August 19, 1912, plaintiff wrote to Mr. W. G. Lloyd, adjuster of defendant insurance company at Portland, Oregon, as follows.

"Long Beach, Wash., Aug. 19th, 1912.

"Mr. W. G. Lloyd,

"Portland, Ore.

"Dear Sir:

"I have been waiting since June 27 for

you to come down and inspect the site of my building that was burnt on that date. I wish to clear up the rubbish from place, but do not want to touch anything till you have *been* it. Mr. Whalley of the New Hampshire Ins. Co. refers me to you hence this letter.

"I wish you would make it a point to come as soon as possible.

Yours respect'y,

"WM. BLACK."

(Tr. p. 460.)

To the above letter reply was made as follows:

"Mr. Wm. Black,

"Long Beach, Wash.

"Dear Sir:

"I have your letter of August 19th, relative to purported claim by reason of fire and in reply I beg to advise as follows:

"If you have a claim under Pol. Co. 590757 issued to you by the Central National Fire Ins. Co. of Chicago, Ill., and Pol. No. 2661130 issued to you by the New Hampshire Fire Ins. Co. of Manchester, N. H., both of which companies I represent and on behalf of said companies I desire to call your attention to the terms and conditions as set forth in lines frim 67 to 112 inclusive.

"You are hereby required to submit proofs of loss as set forth and in accordance with

instructions thereby given in said policies, within sixty days of the fire.

"Upon above compliance I will give the matter attention.

"The said Insurance Companies, above referred to, hereby neither admit nor deny liability."

(Tr. pp. 464-465.)

This communication was replied to by plaintiff as follows:

"Long Beach, Wash., Aug. 23, 1912.

"Mr. Lloyd,
"Portland, Ore.

"Dear Sir:

"Enclosed please find Proofs of Loss as requested. Very respect'y,

"WM. BLACK."

(Tr. p. 459.)

On August 29, 1912, plaintiff again wrote Davenport-Dooley & Company as follows:

"August 29, 1912.

"Davenport-Dooley Co., Portland, Ore.,
"Agents of Central National Fire Insurance Comp. of Chicago, Ill.

"Dear Sir:

"I hold Policy No. 590757 on this Company and have been awaiting for settlement of policy since June 27 and I think I have been treated *veary roten;* have had no one to

come here to *ajust* my loss or give me any information. Now I demand an *emeadite* settlement or I will at once take steps to *colect* it.

"Yours truly,

"WM. BLACK.

"Please let me *here* from you at once."

(Tr. p. 458.)

On August 31st, 1912, W. G. Lloyd the adjuster of the defendant insurance company wrote the plaintiff as follows:

"August 31st, 1912.

"Mr. Wm. Black,

"Long Beach, Wash.

"Dear Sir:

"I am in receipt of your favor of the 23rd, enclosing papers purporting to be proofs of loss under policy No. 590757 and policy No. 2661130 issued to you by the Central National Fire Ins. Co., and the New Hampshire Insurance Co. The same will be given consideration and you will be advised further at the earliest possible moment."

(Tr. pp, 462-463.)

Again on September 10th, 1912, defendant, through its general agents addressed a letter to the plaintiff as follows:

"September 10th, 1912.

"Mr. Wm. Black,
"Long Beach, Wash.

"Dear Sir:

"We are in receipt of your favor of August 23rd, enclosing papers purporting to be proofs of loss under policy No. 590757 issued to you by the Central National Fire Insurance Company, making claim for loss by fire alleged to have occurred on June 27th, 1912.

"The said papers can not be accepted as satisfactory, for the following among other reasons which may subsequently be made to appear:

"The list of articles inumerated is only a memorized list and also contains articles which are not items of stock.

"The amount set forth in said list as representing the value are grossly in excess of the true sound value of said articles, alleged to have been destroyed.

"Under the terms and conditions of your policy you are required to exhibit *the last authentic inventory* taken of your stock or a certified copy thereof. You will also supply *bills of purchases of stock since the last said inventory,* or if said bills of purchases have been destroyed then certified copies of the original bills.

"You are also required to supply a record

of your sales made of stock since the date of inventory above referred to.

"*The said papers cannot therefore be accepted as satisfactory and are held subject to your order.*

"This company hereby neither admits nor denies any liability to you. (Italics ours.)

(Tr. pp. 463-464.)

To this letter Black replied as follows:

"Sept. 12th, 1912.

"Mr. W. G. Lloyd,
"Adjuster Fire Losses,
"Portland, Ore.

"Dear Sir:

"Your letters of Sept. 10th have been referred to my lawyers.

"Yours truly,
"WM. BLACK."

(Tr. p. 459.)

On October 9th, 1912, W. C. Lloyd, adjuster for defendant insurance company, again wrote plaintiff as follows:

"October 9th, 1912.

"Mr. Wm. Black,
"Long Beach, Wash.

"Dear Sir:

"On September 10th, 1912, we wrote you requesting further data and information relative and supplemental to papers filed by

you under policy No. 590757 issued to you by the Central National Fire Insurance Company.

"To this you replied on September 12th, 1912, that you had referred the matter to your lawyers, and since which time nothing further has been heard. If you intend making any claim, we notify you that you comply with our request of September 10th, 1912, above referred to."

(Tr. p. 462.)

To this letter Black replied under date of October 11th, 1912, as follows:

"Oct. 11th, 1912.

"W. G. Lloyd,

"Portland, Ore.

"Dear Sir:

"What has struck you? I have complied with the law. Send you with proof of loss *witch* you refuse to receive as such and claimed in your letter that it was a memorised list. As far as I am or was concerned that letter closed the matter between you and me. I have been treated *roten* by you. You have never called on me and I never saw you. This has been my first fire and I have had no *exsperince* in *maters* of this kind and want no more. I *inshured payed* my money and have *meet* with a loss and want mine and I am going to have it; and take this from me

I have furnished you with everything covering this my loss.

"WM. BLACK."

(Tr. p. 461.)

We have set forth all the correspondence that took place between the parties to this action, to the end that this court may determine whether or not the contention of counsel for the insurance company that plaintiff violated any of the terms and provisions of the policy in question is well taken.

The affirmative defenses plead by the insurance company were as follows:

1st. A violation of the terms and provisions of the policy in that the plaintiff "refused to produce for the examination of this defendant any bills, invoices, or other vouchers of any goods, or certified copies thereof, or any inventory thereof."

2nd. Fraud and false swearing.

3rd. That the fire which brought about the loss "was caused by the act, design or procurement of the plaintiff, and not otherwise."

4th. That the value of plaintiff's stock of goods at the time of the fire did not exceed the sum of $1000.

We feel safe in observing that not the slightest attempt was made on the trial of the action to substantiate any of the defense interposed, counsel for the defendant contenting themselves with attacking the reputation of plaintiff and his witnesses

for truth and veracity, in which attack Henry Kayler, the agent of the insurance company, was not immune. Not the slightest attempt was made on the part of the insurance company to prove that the stock of goods was not of the value claimed by Black, and all attempts to substantiate the defense that the plaintiff was guilty of arson was abandoned upon the trial of the case if it ever was seriously intended to be urged as a defense. In attempting to make out that the plaintiff was guilty of false swearing in attempting to defraud and deceive the company, it appeared that in making out his proof of loss plaintiff inadvertently included certain items of personal property which were destroyed by the fire, but which were not covered by the policy of insurance. It will be noted from an examination of the provisions of the policy that it covered his stock of merchandise consisting principally of "wines, liquors, cigars, beer, soda and mineral water and *all other goods, wares and merchandise* not more hazardous, etc." In making out the proof of loss, which proof of loss was written and constructed by Henry Kayler, agent of the defendant insurance company there was included several items of personal property, such as bottles, towels, cork-screws, lemon squeezers, corks, decanters, glasses, etc. It was testified to by Kayler that at the time he drew the proof of loss he was laboring under the honest impression that these items of personal property were covered by the policy. The testimony in that respect is as follows:

Q. "Now, Mr. Kayler, in making out this proof of loss there is some items included that do not seem to be covered by the policy, such as bottles and towels and so on?"

A. "I supposed it was all a part of the stock when I put it down. I never made out any proof of loss. My business was to write it up, the adjuster did that work generally."

Q. "You sent the proof of loss to the company or adjuster?"

A. "Yes, sir."

Q. "At the time you included those goods, did you believe that those articles I have called your attention to, that they were covered by the policy?"

A. "Sure."

Q. "When you included these articles, was there any intention on your part to defraud the company?"

A. "No, sir; I supposed everything inside of that saloon was covered."

(Tr. pp. 128-129.)

The testimony of plaintiff on this aspect of the case was substantially the same as that of Kayler. (Right here it is just as well to direct the attention of the court to the fact that a certain inventory found on pages 445 to 451, inclusive, of the transcript is separate and distinct from the proof of loss found on pages 432 to 436, inclusive, of the transcript.)

Upon the question of the plaintiff's alleged at-

tempt to defraud the company by including in his proof of loss items not covered by the policy, the lower court charged the jury as follows:

> "There has been some argument about some items covered in his proof of loss that were not covered in the policy. The policy showed that the man was engaged in the saloon business and selling liquors and cigars, and soda waters and other matters that went to make up his saloon business. The merchandise which he was selling were the things that were insured. If he included towels, glasses and matters that he used in the saloon business, if it was so plain on the face of it that they were not covered by the policy that he could not deceive the insurance company, then the court instructs you there would be no fraud on his part simply by including items in there that the defendant insurance company would be presumed to know of by going over the form of the policy they used and they could learn that these things were not covered by the policy itself because it was confined to liquors and such things as saloon-keepers would sell."
>
> (Tr. p. .)

Further on the court charged the jury:

> "If you find from the evidence that Henry Kayler, who was the defendant's agent in issuing the policy, assisted the plaintiff or

acted on his behalf in making out or submitting the proof of loss, that would be no defense to the plaintiff, as said Henry Kayler was not authorized or empowered by the defendant to make out, or assist the plaintiff in making out his proof of loss.

"You are further instructed that the said Henry Kayler in assisting the plaintiff in making out and submitting his proof of loss to the defendant, acted as agent for the plaintiff and did not represent the defendant in that connection in any manner whatsoever.

"You understand the fact that Henry Kayler was the man that did make out the proof of loss, that was a circumstance that you would be authorized to consider in determining whether or not the plaintiff is guilty of fraud, whether he would be likely to go and pick out an agent of the company to prepare a proof of loss." (Tr. pp. 428-429.)

These instructions were not excepted to by counsel for the insurance company. On the trial of the action it was shown by undisputed testimony that plaintiff had been engaged in the saloon business for a number of years, his first saloon being located at Ilwaco, some few miles from Long Beach, to which latter place he had removed, and that at the time he first entered business he carried the highest grades of wines, liquors and cigars that money

could purchase. S. A. Madge, a witness on behalf of the plaintiff, who was formerly in the Internal Revenue service, in his official capacity as such made various visits to Mr. Black's saloon at Ilwaco and Long Beach, testified that he was so impressed with the stock of goods that plaintiff carried that he made an investigation to find the reason therefor, which investigation ended favorably to plaintiff. Madge testified that all of the liquors carried by Black in his saloon at Ilwaco were what is known as "double stamped goods," and that he did not have a barrel of rectified liquors in his place of business. Other witnesses also testified as to the high grade character of the stock of liquors, wines and cigars that Mr. Black carried in stock while running saloons both at Ilwaco and Long Beach. The proof was overwhelming that at the time of the fire his stock of goods was of a value in excess of the amount of insurance carried thereon. The trial in the court below resulted in a verdict in favor of the plaintiff in the sum of $5000.00. A motion for new trial was overruled and judgment entered on the verdict, and the case now comes to this court for further disposition.

ARGUMENT

I.

Learned counsel for plaintiff in error argues that there is error:

1st. In the admission of evidence concerning the value of the goods destroyed by fire.

2nd. In denying the motion for non-suit, which was predicated upon the ground "that the plaintiff refused to furnish defendant with copies of his purchases and invoices and his refusal to perform any of the other conditions in the policy on his part to be performed; and for the further reason that the market value of the property has not been shown." (Tr. p. 259.)

3rd. In denying the motion for a directed verdict based on the proposition that "plaintiff was guilty of false swearing in connection with his loss in violation of the terms of the policy." (Tr. p. 410.)

4th. In denying the motion to set aside the verdict and judgment and grant a new trial.

5th. Error in refusing certain instructions and error in the giving of certain instructions.

In considering the question of whether or not there was reversible error in admission of testimony relative to the market value of the goods destroyed, it is well to ascertain what the lower court charged the jury on that subject. The instructions relative to market value are as follows:

"You have heard a good deal in this case about the opinions of witnesses regarding the market value. The way to arrive at that is if you determine that the market value of the stock covered by this insurance was greater than $5,000, and you find the other issues for the plaintiff, it would not be necessary for you to determine exactly how much it was, because the plaintiff cannot recover more than $5000.00. You would not have to figure exactly how much, if you concluded the stock was worth $5000, and find the other issues for the plaintiff; but if you could not find the other issues for the plaintiff and in figuring it up you find it was less than $5000, it would be necessary for you to determine what the market value of the merchandise—what the fair market value of it was at the time and place where it was burned. There has been a great deal of evidence admitted in the case about the cost in Kentucky, Portland, San Francisco, Seattle and other cities, and evidence concerning liquors and the sale for them at retail, and other matters of that kind, but they are only sidelights, evidence that has been admitted for your consideration in throwing a light on this question of probably what the value, the market value of this liquor and these cigars were at Long Beach at the time of the fire."

"The Court instructs you that the purpose of the policy is in case of an honest loss enabling the policy holder to make himself whole, that is, to replace the property he has lost. You will understand that the retail value at which liquors sell by the glass—you will not resort to that because if he had a large stock of goods, he did not have to buy it that way, he did not have to make himself whole by buying back at retail what he lost by fire. But the law presumes that a man will be able to make himself whole in all probability by buying back at the fair market value, and that is known and sometimes described as the value which one, having a piece of property, was willing to sell, at but did not have to sell, and another man—found a man willing to buy, but who did not have to buy, the price at which these two men would arrive at would be the fair market value. Another way of arriving at that would be the price that men would be compelled to pay for property where they go into the open market to buy. . . . . . If you should find a verdict in favor of the plaintiff, the amount should be the actual market value of the property at the time of its destruction by fire, and no more." (Tr. pp. 415-417.)

These instructions which we have just quoted

were not excepted to by counsel for plaintiff in error.

The first error assigned of which we shall take notice is predicated upon the refusal of the court to sustain an objection to a question propounded to the witness Madge as to the extent and character of the stock of liquors carried by Mr. Black. It seems to the writer that this objection goes to the weight rather than the competency of the testimony. Mr. Madge had been a deputy Internal Revenue Collector for a number of years, and in his capacity as such, often visited Black's saloon, and in this way become acquainted with the stock of goods carried by Black. It was the contention of defendant in error that at the time of the fire he had several barrels of liquor on hand that he carried at Ilwaco, and that the stock of goods was of the same high grade character as he carried at Ilwaco when Madge was in the Revenue service, which contention was amply supported by the evidence on the trial of the case. This witness did not, as stated by counsel for plaintiff in error on page 46 of his brief venture, nor was he asked for his opinion as to the value of plaintiff's entire stock at the time of the fire, nor at any time prior thereto. The answer of plaintiff in error charged that the value of the stock of goods carried by plaintiff at the time of the fire did not exceed the sum of $1000.00, and it will also be noted that the defendant had charged the plaintiff with fraud, false swearing, arson, and all other crimes that are contained in the criminal

code, and the lower court in ruling on the objections of counsel as to the admission of this testimony, said:

> "The plaintiff is accused of fraud. Both the fact of the charge of fraud and the defense for the want of fraud, depends more or less on circumstances, and this is admitted and your objection overruled on the ground that it is a circumstance from which the jury may infer either fraud or want of fraud. (Tr. p. 70.)

The testimony of the witness Madge and the character and extent of plaintiff's stock in trade was amply supported by other witnesses whose knowledge of the same extended up to the date of the fire.

It is next assigned that the lower court committed error in the admission of the testimony of the witnesses Madge, Dickinson, Hagemeyer, and the plaintiff as to the market value of the goods destroyed. It is a well settled proposition of law that the question of the competency of a witness to testify rests largely in the discretion of the trial judge.

> *Meyers v. McAllister*, 103 N. W. 564;
> *Cleveland v. Rowe*, 109 N. W. 817;
> *Stevens v. Minneapolis*, 43 N. W. 842;

It is also just as well settled that unless it clearly appears that that discretion was abused by the trial

judge a reversal does not follow. The proposition is so elementary that it is needless to cite authorities in support thereof. To refute the idea that there was any error in the testimony of these witnesses, it is only necessary to read their testimony. The witness Madge had been in the Internal Revenue service for several years, and had acquired an expert knowledge and information as to the value of different kinds of liquors. He said he was acquainted with the value of double stamped liquors, and that their value depended upon their age. (Tr. pp. 70-73.) He then testified that Old Crow liquor of the vintage of 1900 had a value in 1912 of from $7.00 to $10.00 per gallon. (St. p. 73.) This witness did not testify anything about the value of plaintiff's stock as a whole. The witness Dickenson, after stating that he was familiar with the stock that Black carried, stated he did not know the value of the stock which Black carried "but it is way up in the thousands."

Q. "Do you know the amount and value of the liquors that Black had there?"

A. "No sir, I don't know the exact amount, I know it is way up in the thousands."

(Tr. p. 138.)

The answer is not very clear what the witness meant, but conceding that the witness intended to say that the value of the stock was thousands of dollars, it is not quite clear where any error was committed in refusing to strike the answer. Its

weight was solely for the jury. The witness Hagemeyer, who had been engaged in the liquor business for several years (Tr. p. 244-245) testified that he was acquainted with the brand of liquors known as Old Crow, Cedar Brook, Penwick Rye, and that he knew their fair market value, which he stated. No objection whatever was offered to his testimony on direct examination. On cross-examination he testified the price he had mentioned would not include retailer's profits. (Tr. 246.) The cross-examination was continued as follows:

Q. "If a man was to buy a barrel of any of these different brands and ages of liquors mentioned in June, 1912, you could not tell what he had to pay for it?"

A. "He would have to pay somewhere near I think those prices. (Prices that the witness had mentioned.)

Q. *"That would be to buy it by the barrel?"*

A. *"Certainly."*

Q. "You did not buy any of those years?"

A. "Only in this way, I was in partnership and my partner did the buying and I paid the bills."

(Tr. p. 247.)

This was followed by a motion to strike the witness' testimony as incompetent. (Tr. p. 248.) Comment is unnecessary.

The plaintiff in his own behalf and without any objection testified that he had been engaged in the

saloon business for a number of years, did his own buying, knew the value of such goods as he carried, and without objection from counsel for defendant stated that the fair market value of the goods destroyed by fire was $8000.00. (Tr. p. 172.) It is true as stated by counsel that he was not acquainted with the wholesale price of Old Crow, McBrayer's and Penwick whiskies in 1912. But what of it. Other witnesses had so testified and plaintiff testified that he had in his saloon at the time of its destruction by fire 5 barrels of Old Crow (1905); 4 barrels of Cedar Brook (1903); 3 barrels Green River (1902); 3 barrels Penwick Rye (1904); 1 barrel of Old Crow (1899); 1 barrel of Fox Mountain (1896); 2 barrels of McBrayer's single stamp; 1 barrel Wicklow. On the question of values plaintiff had the benefit of the testimony of H. Armstrong, who had been engaged in the liquor business twenty years, who testified as to the value of the liquors plaintiff claimed to have lost by the fire. (Tr. pp. 238-244.) No assignment of error was predicated on the testimony of this witness. The defendant took the depositions of various witnesses who had been engaged in the wholesale liquor business and who had sold plaintiff liquors from time to time while he was engaged in running the saloon. Many of these depositions were offered and read in evidence by attorney for the plaintiff. The testimony of these various witnesses are illuminating on the question of values and sheds much light on the value of some of the liquors plain-

tiff claims to have lost by fire. We call the attention of the court to the deposition of Julius Friedland, (Tr. pp. 90-93); Robert F. Woelffer, (Tr. pp. 86-88); Joseph Greenbaum, (Tr. pp. 94-95); William P. Penwick (Tr. pp. 95-97); John Ecklund (Tr. p. 99); Monroe L. Bickart (Tr. pp. 131-133. These witnesses all testified as to the cost of certain liquors sold by them to Black. Defendant's witnesses C. R. Brinkley (Tr. pp. 346-7), E. J. Cramsie (Tr. p. 345), and E. W. Duffy (Tr. pp. 353-354), and others testified as to the value of certain brands of cigars sold to Black, which agree in all respects with the prices and values placed upon the same by Black in his inventory, a copy of which was attached to the proof of loss submitted to the insurance company. It can hardly be denied that the cost of an article is competent as tending to show its value.

> *Ellsworth v. Aetna Ins. Co.,* 11 N. E. 355;
> *Aetna Ins. Co. v. Weide,* 9 Wall. 677, 19 L. Ed. 810;
> *Lumber Co. v. Wilmore,* 25 Pac. 556;
> *Johnson v. Farmers' Fire Ins. Co.,* 64 N. W. 5.

The testimony of defendant's own witnesses as to the cost price of the goods if taken with the testimony of plaintiff's witnesses conclusively establishes what it would cost plaintiff to replace the stock of goods destroyed by the fire. At least their testimony as to the value of the goods became a

question for the jury to determine. Before closing this branch of the argument it is just as well to observe that the objections made by counsel to the testimony of Madge, Hagermeyer and Dickinson, et al., did not reach the precise point now argued by counsel on page 41 of his brief. The only objection made upon the trial was that these witnesses were not competent to testify as to values.

II.

On pages 48 and 49 of the brief of counsel for plaintiff in error it is insisted that the plaintiff Black did not comply with that provision of his policy which reads as follows:

> "If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and within sixty days after the fire, unless such time be extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property;

> the cash value of each item thereof and the amount of loss thereon. . . . ."

Until the brief of counsel for plaintiff in error was written we were not aware that it was claimed that plaintiff was in default as to this provision of the policy. No breach thereof was alleged in the pleadings and none was contended for on the trial of the action. It will be remembered that the loss sustained by the plaintiff was a *total* one. There was no property left to protect from further damage. Now, how under such circumstances plaintiff could separate the damaged and undamaged property, or put something that did not exist into the best possible order, or make a complete inventory thereof, we are at a distinct loss to know. The provision of the policy just quoted has reference to a case where the insured sustains a partial loss. Proof of total loss was submitted in the time limited in the policy and accompanying the proof of loss was a complete inventory which had been taken just a few days prior to the issuance and delivery of the policy of insurance. The motion for non-suit was predicated upon the ground, and only upon the ground, that the plaintiff "had refused to furnish defendant copies of his purchase and invoices, and his refusal to perform any of the other conditions of the policy on his part to be performed, and for the further reason that the market value of the property has not been shown." (Tr. p. 259.) The motion for a directed verdict was predicated upon

the ground "that the evidence showed conclusively that the plaintiff was guilty of false swearing in connection with his loss in violation of the terms of the policy, and therefore the policy was void. . . ." (Tr. p. 410.) In neither the motion for non-suit or directed verdict was the attention of the court ever called to the alleged fact that plaintiff had violated that provision of the policy which we have quoted above. Neither were any instructions requested on such a proposition.

III.

It is next argued that the motion for a non-suit should have been granted as the plaintiff cannot recover because of his alleged refusal "to submit to examinations under oath by any person named by this Company and subscribe the same; and, as often as required, shall produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, or to perform any of the other conditions of the policy on his part to be performed." (Brief of counsel for plaintiff in error p. 51.) This statement of counsel is predicated upon the proposition that the plaintiff violated a condition of his policy, which required of him " . . . as often as required shall exhibit to any person designated by this company, all that remains of any property herein described, and submit to examinations under oath by any person named by this company and subscribe the same; and, as often as required, shall produce for examina-

tion all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company, or its representative, and shall permit extracts or copies thereof to be made." This provision was, of course, written in the policy for the benefit of the company and according to the decisions of all the courts is to be strictly construed against the company. In other words, there must be a strict compliance with its terms before the assured can be put in default. The loss occurred on June 27, 1912, and on August 23, 1912, plaintiff submitted to the insurance company his proof of loss, accompaned with a complete inventory, which the proof showed was taken just a few days before the policy of insurance was written. On September 10, 1912, seventeen days after the receipt of the proof of loss, the insurance company by its duly constituted agent, wrote to the plaintiff as follows:

"September 10th, 1912.

"Mr. Wm. Black,
"Long Beach, Wash.

"Dear Sir:

"We are in receipt of your favor of August 23rd, enclosing papers purporting to be proofs of loss under policy No. 590757 issued to you by the Central National Fire Insurance Company, making claim for loss by fire alleged to have occurred on June 27th, 1912.

"The said papers can not be accepted as satisfactory, for the following among other reasons which may subsequently be made to appear:

"The list of articles enumerated is only a memorized list and also contains articles which are not items of stock.

"The amount set forth in said list as representing the value are grossly in excess of the true sound value of said articles, alleged to have been destroyed.

"Under the terms and conditions of your policy your are required to exhibit the last authentic inventory taken of your stock or a certified copy thereof. You will also supply bills of purchases of stock since the last said inventory, or if said bills of purchase have been destroyed then certified copies of the original bills.

"You are also required to supply a record of your sales made of stock since the date of inventory above referred to."

This letter is supposed to contain demand which put plaintiff in default by his alleged refusal to comply therewith. The inventory demanded was already in the possession of the company, although the provision of the policy which it is alleged the plaintiff violated does not call for the submission of an inventory, it simply requires plaintiff upon request to "*produce for examination all books of*

account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company, or its representative, and shall permit extracts or copies thereof to be made."... The demand was for the "last authentic inventory," and further, for "*bills of purchases of stock since the last said inventory, or if said bills of purchases have been destroyed, then certified copies of the original bills.*" The demand did not ask for the production of any books of account, bills, invoices or other vouchers, or certified copies thereof, but only demanded that he supply "bills of purchases of stock since the last said inventory, or if said bills of purchases have been destroyed, then certified copies of the original bills." The demand did not require him to submit any books of account, bill of account, invoices or other vouchers covering purchases prior to the taking of the last inventory, and there is no proof in the record disclosing that any purchases were made between the date of the last inventory and the date of the fire. Neither was any place designated for the production of "bills of purchases of stock since the last inventory." No record was kept of any sales between the date of the inventory and the date of the fire (Tr. 191).

The motion for non-suit was properly denied for several reasons:

1st. The demand was for bills of purchase since "the last authentic inventory," while the motion for

non-suit was predicated upon the refual of the plaintiff to furnish defendant with copies of his purchases and invoices. (Tr. p. 259.)

2nd. The time and place for the production of bills of purchases since "the last authentic inventory" was not designated—hence the demand was insufficient to put the plaintiff in default.

3rd. The letter of September 10th, 1912, (Tr. p. 463) written by the defendant to the plaintiff is virtually a denial of all liability on the part of the insurance company.

With the proof of loss submitted by the plaintiff to the defendant was a copy of an inventory taken shortly before the policy was issued. The insurance company in its letter of September 10th, 1912, (Tr. p. 463) respecting the proof of loss claimed that it was a "memorized" list and demanded "an authentic inventory," coupled with a demand for "all bills of purchases of stock since the last said inventory." In other words it attempted to place a burden on the assured that his contract did not place upon him. They attempted to require of him the impossible, and now claim he is in default and his policy void by reason thereof. Instead of making a demand on the plaintiff in compliance with the provisions of the policy they made a demand not justified by the terms of the policy. What the insurance company would consider an "authentic inventory" and what would have satisfied them in that respect, we are not advised. However, we are

advised by their letter of September 10th, 1912, that they accuse plaintiff of fraud and false swearing, and that they rejected his proof of loss, and that they advise him that his proof of loss was held subject to his order. It is fundamental that a denial of liability on the part of the insurance company is a waiver of all conditions subsequent to be performed by the assured.

The letter of September 18th, written by the insurance company to Black was a denial of all liability for the loss, and if a denial of liability is waiver of proofs of loss, then denial of liability upon being furnished with proofs of loss is waiver of compliance with the terms of the policy, by assured.

After having accused plaintiff of fraud and rejecting his proof of loss the insurance company lost the right to demand compliance with any of the terms of the policy.

Phenix Ins. Co. v. Luce, 123 Fed. 259.

In the case just cited the assured claiming to have sustained a loss, submitted his proof of loss, and the company thereupon wrote him as follows:

> "It has come to us from sources of great reliability that before the fire to which you refer the building insured by this company under its policy 8,732 had fallen into a broken mass of valueless wreckage, and that the fire (so far as your property was concerned) destroyed nothing that was worth

preserving. If the information, coming to us from many trustworthy sources, is correct, the Phenix Co. is not liable for the loss you claim to have sustained.

"If it be not true that your building fell in ruins from its own weakness and was only a congeries of broken materials when the fire broke out, then we shall treat with careful consideration the evidence you may wish to offer in support of your claim. If, however, we are correctly informed (which we believe to be the case) concerning the circumstances of the disaster set forth in your affidavit, then there should be no controversy between us as to the matter of the claim, there clearly being no liability under our policy."

The assured construed the latter as a denial of all liability and commenced action. It was contended upon the trial that the action was prematurely brought and the court ruled to the contrary, and held that the letter was a denial of all liability.

The correspondence between the parties to this action and all subsequent proceedings, clearly indicate the intention on the part of the insurance company and its agents to deal unfairly with the plaintiff, to catch him napping, to place him in default if possible, and then claim a forfeiture. This is always odious in the eyes of the law. That they did not succeed in their nefarious scheme was due more

to their agent's ignorance of the law than to any other element.

Again, the demand was absolutely insufficient to place the plaintiff in default for the very simple reason that it absolutely failed to fix a time and place when the plaintiff might exhibit "the last authentic inventory" or "bills of purchases of stock since the last said authentic inventory."

> "A requirement in a policy that the assured shall produce his books and other designated documents at such reasonable place as may be designated by the company should ordinarily be construed as meaning a reasonable place in the locality where the loss occurred." *Murphy v. Northern British & M. Co.*, 61 Mo. App. 323.
>
> "If the insurer having an office without the state fails to reasonably advise insured of a convenient place within the state where the documents may be produced, he is excused from producing them." *Seibel v. Insurance Co.*, 62 Atl. 101.
>
> "Failure of plaintiff in an action on a fire policy on a stock of goods to produce books and vouchers may not be complained of, there having been no proper demand for their production. *Warrinsky v. Fidelity Surety Co.*, 92 N. Y. S. 771.

A clause requiring assured to produce for examination his books of account at such reasonable

place as may be designated by the company, means a reasonable place in the locality where the insured's property is situated.

Tucker v. Colonial Fire Ins. Co., 51 S. E. 86.

Aetna Fire Insurance Co. v. Simmons, 49 Neb. 811, 69 N. W. 125, holds that a statement that a company desires the insured to submit to an examination and the request that he shall name a convenient date at which he will be prepared to do so, without naming any place, is not such a demand as puts him in default where the policy provides for an examination at such reasonable place as shall be designated by the company.

Learned counsel for the insurance company admit that the letter of September 10th, 1912, fails to name any time or place where the plaintiff might produce his "last authentic inventory" and his bills of purchases since said "last authentic inventory," but insists that "the insured absolutely refused to produce any books or papers for inspection at any place whatever, and in addition to this refused to perform any of the terms or conditions of the policy on his part to be performed," in assisting the company in adjusting the loss, stating that he had complied with the law and furnished everything that was required, and that the company's letter to him requesting books and papers settled the matter as far as he was concerned." (Brief p. 58.) This defense is predicated upon the letter written by plaintiff under date of October 11, 1912, to W. G.

Lloyd, adjuster of the insurance company. That letter is as follows:

> "What has struck you? I have complied with the law. Send you with proof of loss *witch* you refuse to receive as such and claimed in your letter that it was a *memorised* list. As far as I am or was concerned that letter closed the matter between you and me. I have been treated *roten* by you. You have never called on me and I never saw you. This has been my first fire and I have had no *exsperince* in *maters* of this kind and want no more. I *inshured payed* my money and have *meet* with a loss and want mine and I am going to have it; and take this from me I have furnished you with every thing covering this my loss.
>
> "WM. BLACK."
>
> "Say you had better save your stamps I will get them just the same with a 2 cent stamp or do you take me for a farmer."

In overuling the motion for non-suit and commenting on the letter of September 10th, 1912, written by the insurance company to Black, and the letter of October 10th, 1912, written by Black to the insurance company, Judge Cushman tersely said:

> " . . . . The provision of the contract requiring that he produce these things is a wholesome provision and it is for the protec-

tion of the company, but when they have got a provision in there that he shall furnish them at some reasonable place, under the strict construction of the contract against the insurer, it is their duty to designate some reasonable place, and if they meant by this that he produce them in Portland, outside of the state of Washington, the court would be prepared to hold that was an unreasonable place. As I read this letter, your company had rejected his proof of loss, and told him that you would hold it subject to his order. As I read his letter, that is particularly what he is crying out against. He has done all in that matter that he will do, and when he says, 'You have never called on me, and I have never saw you' that left the matter open to your company, and warned you that if you required anything more of him or anything in the line of matters you spoke of, about bills of invoices, his idea was the reasonable place would be down there in that town where he lives and the court thinks so too. (Tr. p. 258.)

What then does the record show as to whether the plaintiff refused to furnish the insurance company with all documents and information that he possessed concerning his loss. The defendant produced W. G. Lloyd, its adjuster, as a witness in its behalf, and he testified that in January, 1913, some

time after this action was commenced, he went to Long Beach in company with Mr. Cole, one of the attorneys for the insurance company, at which place Black was residing, and there they requested Mr. Black to give them a written order on the Bank at Astoria, Oregon, authorizing the bank to permit them to investigate the status of Mr. Black's account with the bank. This Black did without any objection on his part. (Tr. p. 262.) At the same time Black also exhibited to them a bundle of charred bills and invoices that had been partially, but not entirely destroyed in the fire, and at the same time told them he was willing to furnish them all information possible. (Trans. p. 191. This evidence, coming as it does from the insurance company, seems to be rather a conclusive answer to the contention of counsel for the insurance company that Black refused by his letter of October 10th, 1912, to do anything further to and the insurance company in determining the amount of the loss. No one can read the testimony in this case, especially the correspondence, between the parties, without being impressed with the idea that the insurance company was not dealing fairly with the plaintiff.

But it is now for the first time insisted by counsel for the insurance company that the plaintiff *waived* a proper demand upon him to produce his inventories and bills of purchases since the "last said authentic inventory" by his letter of October 11th 1912. If this be true, then why not a waiver instead of a demand plead in the answer filed by the

company. It is a general rule that if a waiver is to be relied upon it must be pleaded.

> *Brown v. Fire Ins. Co.*, 5 So. 560;
> *Cassimus v. Scottish Union National Ins. Co.*, 33, So. 163;
> *Merchants Natl Ins. Co. v. Pearce*, 84 Ill. App. 255;
> *Continental Ins. Co. v. Baulne*, 126 Mo. 410, 26 N. E. 119, 10 L. R. A. 843; ,
> *Evans v. Queen City Ins. Co.*, 31 N. E. 843;
> *Sisk v. Citizens Ins. Co.*, 54 N. E. 804.

IV.

Pages 63 to 86 of the brief of counsel for plaintiff in error is devoted to a labored attempt to demonstrate that a directed verdict should have been ordered for the insurance company on the theory that the evidence clearly demonstrated that the insured was guilty of fraud and false swearing in violation of the terms of the policy. We might safely dismiss this phase of the case by remarking that this issue was submitted to the jury under apt and appropriate instructions, to which no exceptions were taken, and that their verdict on disputed questions of facts will not be reviewed by this court. However, we are willing to meet counsel on the proposition that the evidence is not even conflicting on the issue of fraud and false swearing. Counsel for the insurance company confuse the ideas of credibility and conjecture. The question presented

here is merely one of credibility of the evidence, and the evidence is all in favor of the insured on the issue of fraud and false swearing. It is, no doubt, true, and it is a wholesome provision of the law that where the insured has been guilty of fraud and false swearing such conduct renders his policy void, and he cannot successfully maintain an action thereof. But who is to determine whether or not the insured is guilty of fraud and false swearing? Is a mere suggestion from counsel for the insurance company sufficient for that purpose? We believe not. Counsel does not seem to appreciate the rule that it is only in rare instances that the trial court should withdraw from the consideration of the jury cases of this character. We believe that the only instance of the court's lawful exercise of this power exists when there is a state of facts in the record which is undisputed, and when such facts do not admit of more than one inference to be drawn therefrom by impartial men. But, on the other hand, if the facts in evidence be controverted, or there is a conflict of evidence, or if men of fair mind might draw different conclusions from uncontroverted facts, then the case must always be submitted to the jury and their verdict is final. Was the evidence such in this case that only one conclusion could be drawn therefrom by imparial men? We think not. Counsel ignores the disputed evidence and calmly proceeds to argue that plaintiff is guilty of fraud and false swearing without even a suspicion of proof upon which to base such an argument. They absolutely

ignore the proposition that on the question as to the value of the case goods, wines, cigars, cigarettes, bitters, champagne, etc., that the insured had in his proof of loss inventoried the same *at the price paid by him to the wholesalers.* For proof of this statement the court has only to read the many depositions taken by defendant. (See deposition of Bickart, Tr. pp. 131-133; Ecklund, Tr. p. 99; Greenbaum, Tr. pp. 94-95; Adams, Tr. pp. 337-338; Brinkley, Tr. pp. 346-347; Cramsie, Tr. p. 353, et al.) As to the value of old liquors contained in barrels, the testimony of William H. Armstrong, (Tr. p. 238), S. A. Madge (Tr. pp. 345-346); and W. A. Hagermeyer (Tr. p. 244) and the plaintiff is particularly convincing.

Counsel for the insurance company made little, if any effort to contradict or discredit the testimony of the witnesses Madge, Hagermeyer, Armstrong and the plaintiff as to the value of the liquor contained in barrels. They only introduced one witness (F. A. Kellog, Tr. pp. 371-375) on this aspect of the case, but no one can read his testimony as printed in the transcript and arrive at any correct understanding about what he was testifying. If it is true as contended for by counsel, that plaintiff put an exorbitant value on his goods such as would indicate fraud and false swearing, then why was it counsel closed the case without introducing the testimony of expert witnesses to show the true value of the articles which it is alleged were over-valued? There is quite a distinction between legal proof and

suspicion, a distinction which counsel for the insurance company seems slow to grasp. We can hardly believe that counsel is laboring under the impression that this court will take judicial notice of the value of different brands of whiskies, and that therefore it was unnecessary to show by testimony that a brand of liquor of the market value of $3.00 to $4.00 per gallon in 1903, could not possibly have a value of $7.00 or $8.00 per gallon some years later. The courts of Kentucky and North Carolina might feel that the law of judicial notice could properly be extended to fit such a case, and that they could arbitrarily decide that question, but counsel for the plaintiff is not willing to concede that this court possesses any such qualification. We have not the time or the inclination to follow counsel in their argument as contained in pages 67 to 86 of their brief in their futile attempt to demonstrate that plaintiff was guilty of fraud and false swearing, for the simple reason that in the last analysis the question was one for the jury to decide, and we have already set forth sufficient testimony to show that that question could not be decided as a matter of law. The trial court fully and fairly instructed the jury on the issue of fraud and false swearing, and counsel for insurance company failed to note any exceptions thereto. Conceding, without admitting, that the plaintiff did place a value on some of his bulk liquors higher than the market price justified, if there was any market price for the same, yet that fact standing alone is not sufficient to convict

plaintiff of fraud or false swearing. The law is that:

> "The sworn statement of insured as to the amount of a loss, although found to be excessive does not constitute false swearing or misrepresentation which will void the policy where it was made in good faith and there was room for an honest difference in opinion as to whether the loss was total or partial." *Spring Garden Ins. Co. v. Amusement S. Co.*, 178 Fed. 519, 102 C. C. A. 29.
>
> "A false statement in the proofs of loss to defeat a recovery must be false to the knowledge of assured and made for the purpose of defrauding the company." *Merritt v. Ins. Co. of North America*, 23 Fed. 245.
>
> "In general, however, the mis-statement, although under oath, if not intentionally false and made with the purpose to defraud does not constitute such fraud or false swearing as to defeat recovery." 19 Cyc. 855-866, Note 96, and authorities there cited.

There was no special finding of the jury, neither is there anything in the record to support the charge of over-valuation, fraud or false swearing.

V.

It is again insisted by counsel for plaintiff in error that the judgment should be reversed because of error in giving and refusing instructions. Error

is assigned to the refusal of the court to give instructions III, IV, VI and XI, requested by the company. However, counsel make no argument in their brief predicated on these asignments. The general charge to the jury so fully and completely covered every phase of the case upon which counsel requested instructions, that we do not wonder that counsel refrains from any argument concerning any alleged error of the court in failing to give the requested instructions. It is fundamental that if a proposition of law is covered by the general charge, it is not error to refuse a specific request covering the same matter. It is also assigned that the court committed error in the giving of a certain instruction requested by counsel for plaintiff as follows:

> "It is provided by the statute of the State of Washington (Sec. 105, Laws of 1911, p. 243) as follows: 'Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected.' Under this provision of the law I charge you that the defendant in-

surance company was presumed to know at the time it issued this policy of insurance in the sum of $5000 covering the property described in said policy and situated in the buildings described in said policy, the value of said property. If it now claims otherwise the burden of proof rests with the defendant to so show by a fair preponderance of the evidence." (Tr. p. 418.)

The exceptions to the instructions refused and to the instructions given cannot be considered for the following reasons:

1st. The exceptions were not timely taken.

2nd. The exception to the instruction above quoted was general and not specific. In other words the exception to the instruction which we have set out above did not direct the attention of the trial court to the precise objection counsel now urges against it. The exceptions were not timely because when taken the jury had retired to consider of their verdict. (Tr. p. 426.) It is the settled law in this circuit that under such circumstances the exceptions will not be considered.

Yates vs. U. S. 90 Fed. 57 (9th Cir.)
Western Union Tel. Co. vs. Baker, 85 Fed. 690 (9th Cir.)
Bank vs. McGraw, 76 Fed. 930 (9th Cir.)
Johnson vs. Garber, 73 Fed. 523, C. C. A. 6th;
Walton vs. U. S., 9 Wheat. 658;

Phelps vs. Mayer, 15 How. 160; 14 L. Ed. 643;
U. S. vs. Carey, 110 U. S. 51;

This court in the case of *Arizona & New Mexico Ry. Co. vs. Clark*, 207 Fed. 817, just recently held that exceptions to the giving of instructions where no exceptions were taken thereto while the jury was at the bar, could not be considered though the record recited that before the jury retired the court granted permission to the defendant to embody in its bill of exception, if it should tender one, its objections to the court's instructions more at length and in detail. Counsel for the insurance company insist that a rule adopted by the lower court, which they set forth in their brief, gives them the right to take exceptions to instructions after the retirement of the jury. This rule is not embodied in any statement of facts or bill of exceptions, and is not properly before this court. However, this objection is fully met and answered in the case of *Arizona & New Mexico Ry. Co. vs. Clark*, supra, where the trial court granted permission to take exceptions after the retirement of the jury, and in the case of *Western Union Tel. Co. vs. Baker*, supra, where it was held that even though a practice obtained in the lower court of taking exceptions to the instructions after the jury retired, it did not give the court power to consider an exception which was not reserved at the only time when under the law it could have been reserved, viz., at the time and while the jury were at the bar. Again, the exception to the instruction quoted on

pages 86 and 87 of brief of counsel for plaintiff in error was general in its nature and totally insufficient to call the precise objection now urged against the instruction to the attention of the trial court.

> "An exception not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous cannot be considered by an appellate court." *Montana Mining Co. vs. St. Louis Mining & M. Co.*, 147 Fed. 897, 78 C. C. A. 33.
>
> "To entitle the plaintiff in error to the review of instructions, the exception taken must have been sufficiently specific to point out to the trial court the particular matter of law objected to." *Lafayette Bridge Co. vs Olson*, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33.
>
> *Cass County vs. Gibson*, 107 Fed. 363, 46 C. C. A. 624.
>
> "An exception to a charge cannot be sustained which fails to call the attention of the court to its particular infirmity." *Porter vs. Buckley*, 147 Fed. 140, 78 C. C. A. 138.
>
> "An exception to an instruction cannot be enlarged upon appeal so as to present an objection not presented to the trial court." *Great Western Ry Co. vs. McCormick*, 200 Fed. 375.
>
> "An assignment of error will not be considered when the exceptions were insufficient

to call the question to the attention of the trial court." *Springer Lithographing Co. vs. Falk*, 59 Fed. 707, 8 C. C. A. 224.

N. P. Ry. Co. vs. Krohne, 86 Fed. 230, 2, 9 C. C. A. 674.

At any event the instruction which we have quoted above was a proper one. The instruction does not as contended for by counsel have the effect of "practically directing a verdict in favor of the plaintiff." Its only effect is to inform the jury that at the time the policy was issued that the property covered thereby had an insurable value of $5000.00. Such is the plain terms of the statute which forbids the issuance of a policy in excess of the insurable value of the property covered. Certainly the presumption attaches that the insurance company did not violate the statute. The law imposes some duty upon the insurance company other than that of collecting the premium.

VI.

Counsel for the insurance company on pages 93 and 94 of their brief argue that the lower court was in error in failing to instruct the jury "that if the property was destroyed by the act, procurement, or design of the plaintiff they should return a verdict in favor of defendant."

There are several answers to this contention. It is sufficient to observe that no such question was made and no exception was taken by counsel for the

insurance company to the failure of the court to so instruct the jury.

The court did instruct the jury as follows:

> "The defendant having alleged that the plaintiff caused the fire himself, so far as that affirmative defense is concerned, the burden of proof is upon the defendant and not upon the plaintiff in that regard. . . ." (Tr. p. 415.)

Furthermore, we undertake to say that there was not a scintilla of evidence that in the slightest degree tended to support such a defense, and the court should have withdrawn that defense from the consideration of the jury.

VII.

Counsel also assigned as error (brief p. 93) the refusal of the court to give the following instruction:

> "If you find from the evidence that the plaintiff in his sworn proof of loss, placed an excessive valuation on the whole property burned, or on single portions or quantities thereof, and that such excessive claim was wilfully or carelessly made, then your verdict should be for the defendant."

This proposed instruction omits one essential and necessary qualification, viz: the intent to deceive and defraud.

Merrill vs. Ins. Co. of N. A., 23 Fed. 245.

It is not for the court to say where fraud is to be inferred, for instance from excessive overvaluation on the property in the proof of loss.

Heldring vs. Svea Ins. Co., 54 Cal. 156;
Goldstein vs. St. Paul Ins. Co., 99 N. W. 696;
Williams vs. Ins. Co., 61 Me. 67.

In any event the general charge of the court so completely and fully covered this subject that it is unnecessary to pursue the subject further. Counsel for the insurance company makes no argument on this assignment of error.

On page 91 of brief of counsel for the plaintiff in error they make the statement that the trial judge on the motion for new trial said "he was inclined to believe that the verdict was excessive, but that if the insurance company had selected an agent as bad as they claimed Henry Kayler to be, they must expect to suffer some embarrassment by reason thereof." We have searched the record in vain to find any such statement as counsel attributes to Judge Cushman, and we have no recollection of his having made any such statement. This assertion of counsel, however, is only on a par with their claim that the evidence convicts the plaintiff of fraud and false swearing.

VIII.

It is insisted that the lower court committed error in including interest on the judgment at the rate of six per cent. per annum from the 6th day of De-

cember, 1912. This action was commenced in the state court on that date. As a matter of fact, the judgment should have included interest from the date the same became due under the policy, which was sixty days after the submission of proof of loss, which took place on August 23rd, 1912. In other words interest should have been computed on the judgment from the 23rd day of October, 1912. That there was no error in allowing the interest on the judgment from December 6th, 1912 we cite:

> *R. & B. Code* (Wash.) Sec. 6250;
> *Wood vs. Cascade Fire Ins. Co.* 8 Wash. 427;
> 22 Cyc. pp. 1492 and 1530.

In conclusion we have to observe that the case was fairly tried, the rights of the insurance company fully protected, no reversible error is apparent upon the face of the record, the judgment was right and should be affirmed.

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